

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

M.W., Appellant)	
)	
and)	Docket No. 21-0793
)	Issued: December 27, 2021
DEPARTMENT OF VETERANS AFFAIRS,)	
RICHARD L. ROUDEBUSH VA MEDICAL)	
CENTER, Indianapolis, IN, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 29, 2021 appellant filed a timely appeal from a November 24, 2020 merit decision and an April 12, 2021 nonmerit 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a medical condition causally related to the accepted July 28, 2020 employment incident; and (2) whether OWCP properly determined that he had abandoned his request for an oral hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 28, 2020 appellant, then a 51-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on July 28, 2020 he sustained a right shoulder injury when he raised a large roll of heavy cables overhead while in the performance of duty. He indicated that he heard a pop, felt a sharp pain, and lost strength in his right arm. Appellant stopped work on the date of injury and returned to full-time limited-duty work on July 29, 2020.

In a medical report dated August 11, 2020, Dr. Christopher Neher, a Board-certified orthopedic surgeon, noted that appellant related complaints of moderate-to-severe right shoulder pain, which he attributed to an injury at work on July 28, 2020 when he was moving a roll of wire. He measured appellant's range of motion and performed x-rays, which revealed moderate-to-severe degenerative changes at the acromioclavicular (AC) joint, a Type 2 acromion, and sclerotic changes of the greater tuberosity. Dr. Neher noted appellant's prior history of right rotator cuff repair in January 2019 and diagnosed him with acute pain of the right shoulder. In a separate letter of even date, he recommended restrictions of no work above chest level and no lifting over 10 pounds. Dr. Neher repeated these restrictions in a subsequent letter dated August 13, 2020.

In a letter dated August 18, 2020, the employing establishment controverted the claim, arguing that the medical evidence submitted did not establish a valid diagnosis in connection with the July 28, 2020 employment incident.

In a September 10, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, OWCP received various physical therapy notes for dates of service between August 27 and October 5, 2020. In a visit note dated September 1, 2020, Tracie King, a physical therapist, indicated that appellant reported feeling good over the weekend, but then possibly aggravated his right shoulder at work. A September 3, 2020 physical therapy note reflected that his right shoulder was painful and sore after working around his house.

In a September 22, 2020 follow-up report, Dr. Neher noted that appellant's pain had improved, but was still waking him up at night. He performed a physical examination and diagnosed acute pain of the right shoulder. In a separate letter of even date, Dr. Neher indicated that appellant could return to work with a restriction of no lifting over 10 pounds.

In response to OWCP's questionnaire, appellant submitted a statement dated September 23, 2020 explaining that on July 28, 2020 he was lifting a roll of metal clad cable weighing approximately 30 pounds. When he extended his right arm forward to place the wire on a shelf, he felt a sharp sting and heard a popping sound in his shoulder. Appellant indicated that he had undergone surgery to the right shoulder in January 2019 for a torn rotator cuff, and was concerned that the popping sensation was scar tissue breaking free from surrounding tissue.

In a report dated September 24, 2020, Dr. Neher diagnosed acute pain of the right shoulder and clarified that appellant's work restrictions should include avoiding repetitive motion such as pushing, pulling, bending or twisting with the right shoulder.

Dr. Neher evaluated appellant again on October 27, 2020 and noted that he was no longer having any pain in the right shoulder. He again diagnosed acute right shoulder pain. In a separate report of even date, Dr. Neher released appellant to return to work without restrictions.

By decision dated November 24, 2020, OWCP denied appellant's traumatic injury claim, finding that he had not submitted sufficient evidence to establish a medical diagnosis in connection with the accepted July 28, 2020 employment incident. Consequently, it found that he had not met the requirements to establish an injury as defined by FECA.

On December 5, 2020 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 10, 2021 notice, OWCP's hearing representative informed appellant that his oral hearing was scheduled for March 17, 2021 at 3:00 p.m. Eastern Standard Time (EST). He was instructed to "call the toll-free number listed below and when prompted, enter the pass code also listed below." OWCP's hearing representative mailed the notice to appellant's last known address of record. Appellant did not appear for the hearing and no request for postponement of the hearing was made.

By decision dated April 12, 2021, OWCP found that appellant had abandoned his request for an oral hearing as he had received written notification of the hearing 30 days in advance, but failed to appear. It further noted that there was no indication in the record that appellant had contacted the Branch of Hearings and Review either prior to or subsequent to the scheduled hearing to explain his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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

² *Supra* note 1.

³ *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).

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 determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury.⁶

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.⁷ 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 incident identified by the claimant.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted July 28, 2020 employment incident.

In his August 11, September 22 and October 27, 2020 reports and in his September 24, 2020 report, Dr. Neher provided an assessment of acute right shoulder pain. The Board has held that, under FECA, an assessment of pain is not considered a diagnosis, as pain merely refers to a symptom of an underlying condition.⁹ In his reports dated August 11 and 13, and September 22, 2020, Dr. Neher outlined work restrictions, but did not provide a medical diagnosis or opinion explaining the cause of appellant's diagnosed condition. The Board has held that a medical report is of no probative value if it does not provide an opinion as to whether the accepted employment

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.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁸ *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁹ *A.M.*, Docket No. 20-0545 (issued May 20, 2021); *D.H.*, Docket No. 20-0577 (issued August 21, 2020); *M.V.*, Docket No. 18-0884 (issued December 28, 2018). The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. See *P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

incident caused or aggravated the claimed condition.¹⁰ Thus, this evidence is insufficient to establish appellant's claim.¹¹

The remaining evidence of record consists of physical therapy notes dated August 27 through October 5, 2020. These notes have no probative value, however, because physical therapists are not considered physicians as defined under FECA.¹²

As the evidence of record is insufficient to establish a medical diagnosis in connection with the accepted July 28, 2020 employment incident, the Board finds that appellant 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.

LEGAL PRECEDENT -- ISSUE 2

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.¹³ Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.¹⁴ OWCP has the burden of proving that it was properly mailed to the claimant and any representative of record.¹⁵

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.¹⁶

¹⁰ *B.M.*, Docket No. 21-0198 (issued June 29, 2021); *L.E.*, Docket No. 19-0470 (issued August 12, 2019); *M.J.*, Docket No. 18-1114 (issued February 5, 2019).

¹¹ *S.Q.*, Docket No. 20-1208 (issued May 4, 2021).

¹² Section 8102(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. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *C.S.*, Docket No. 20-1354 (issued January 29, 2021); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *E.W.*, Docket No. 20-0338 (issued October 9, 2020); *Jane A. White*, 34 ECAB 515, 518 (1983) (physical therapists are not considered physicians under FECA).

¹³ 20 C.F.R. § 10.616(a).

¹⁴ *Id.* at § 10.617(b).

¹⁵ *L.T.* Docket No. 20-1539 (issued August 2, 2021); *A.R.*, Docket No. 19-1691 (issued February 24, 2020); *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹⁶ *Supra* note 14 at § 10.622(f).

The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing.

The record establishes that on February 10, 2021, in response to appellant's request for an oral hearing, a representative of OWCP's Branch of Hearings and Review properly mailed a notice of the scheduled telephonic hearing to be held on March 17, 2020 at 3:00 p.m., EST. The hearing notice was mailed to appellant at his last known address of record and provided instructions for his participation. Appellant, however, failed to call-in for the scheduled hearing using the provided telephone number and passcode. He did not request a postponement or provide an explanation to OWCP for his failure to attend the hearing within 10 days of the scheduled hearing. The Board, thus, finds that OWCP properly determined that appellant abandoned his request for a telephonic oral hearing.¹⁸

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted July 28, 2020 employment incident. The Board further finds that OWCP properly determined that he abandoned his request for an oral hearing.

¹⁷ *Id.*; *M.C.*, Docket No. 21-0351 (issued June 29, 2021); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011); *see also A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2020 and April 12, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 27, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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