United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 06-2025**
	)	**Issued: March 7, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Trenton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 31, 2006 appellant, through counsel, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated March 16, 2006 denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits. The Board also has jurisdiction to review the Office's June 21, 2006 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury causally related to the November 18, 2003 employment incident; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 18, 2003 appellant, a 47-year-old letter carrier, filed a traumatic injury claim alleging that he injured his head, back and neck on that date when the back of the chair in

which he was sitting broke and he fell backwards. The employing establishment controverted the claim.

In a letter dated December 2, 2003, the Office informed appellant that additional evidence was required. The Office subsequently received a December 4, 2003 disability note by Dr. Harold J. Brown, a treating physician.

By decision dated January 8, 2004, the Office denied appellant's claim on the grounds that fact of injury had not been established.

In progress notes dated February 12, 2004, Dr. Frederick J. McEliece, a Board-certified neurosurgeon, noted cervical and mid-thoracic complaints.

Appellant requested an oral hearing before an Office hearing representative, which was held on May 23, 2005. He submitted a January 8, 2004 report from Dr. McEliece, who noted that appellant had returned to a modified position in 2003, following a December 2001 employment injury. Appellant fell at work in October 2003 and broke his ankle and foot. In November 2003, the chair he was sitting in collapsed "backward, dumping him on his head, neck and back while he struck his foot on the table, reinjuring this area." Dr. McEliece noted that this fall also exacerbated "all of his original problems to an insupportable level of pain." A physical examination revealed a slightly reduced range of motion with diffuse tenderness and some mild spasms in the neck. Dr. McEliece also reported discoloration and swelling in the left foot and restricted right shoulder range of motion. Diagnoses included cervical, thoracic, lumbar, shoulder and foot pain syndrome secondary to trauma with depression, presumably secondary to the above.

On August 9, 2004 the Office received a November 18, 2003 emergency room report in which appellant related that he injured himself when the chair he was sitting in collapsed. He hit his head on a box and complained of pain in his head, neck and middle to upper back. The nurse reported that appellant became "very upset with inability to be admitted." The diagnosis was musculoskeletal pain following a fall. The discharge instructions reported head and back injury and muscle strain. The x-ray interpretation revealed no fractures.

On January 21, 2005 appellant submitted various reports and treatment notes from Dr. David S. Eingorn, a treating Board-certified orthopedic surgeon. On February 19, 2004 Dr. Eingorn reported that appellant sustained an employment injury in November 2003 when his chair collapsed at work. Since the injury appellant experienced persistent pain and tenderness in his right shoulder. Diagnoses included a left shoulder rotator cuff impingement syndrome and "most likely a subluxation and dislocation event." A physical examination revealed pain and tenderness in the subacromial shoulder space and a mildly positive impingement test. The upper extremity neurologic examination was normal. Dr. Eingorn noted that appellant had full range of motion of the left shoulder and no tenderness. An x-ray interpretation "was negative *per se* just except for [T]ype III acromion." In March 10, 2004 treatment notes, Dr. Eingorn reported that a shoulder magnetic resonance imaging (MRI) scan "showed rotator cuff arthropathy and acromioclavicular (AC) joint arthritis mild with no tear." Dr. Eingorn diagnosed persistent impingement syndrome symptoms in September 29, 2004 treatment notes. He also noted that appellant continued to have persistent pain and tenderness in his foot. A review of objective

testing showed no fracture identified at this time and is healed. On November 3, 2004 Dr. Eingorn reported that appellant was doing well following his shoulder surgery until landing on his shoulder when he fell. He diagnosed a shoulder contusion. Dr. Eingorn also reported that appellant continued to have complaints of tenderness and pain in his left foot.

In an April 19, 2004 treatment note, Dr. John P. Nolan, a Board-certified orthopedic surgeon, reported x-ray interpretations "appeared to show consolidation of the facture." He noted that appellant continued to have significant pain in multiple areas of his left foot which was not explained by the physical examination or objective testing. On March 16, 2005 Dr. Eingorn reported that appellant continued to have some point tenderness posteriorly and laterally over his shoulder with persistent pain and tenderness in the left foot.

In a report dated October 13, 2003, Dr. Nolan reported that appellant fractured his foot based upon x-ray interpretations. On November 17, 2003 he reported that he continued to have some discomfort and an x-ray interpretation revealed "incomplete healing of the fracture." In September 29, 2004 treatment notes, Dr. Eingorn diagnosed rotator cuff arthropathy with impingement syndrome and scheduled surgery. He noted that appellant continued to have complaints of pain in his left foot and right shoulder. A March 1, 2004 MRI scan revealed no evidence of a full thickness rotator cuff tear, distal supraspinatus tendonopathy or tendinitis.

In a May 18, 2005 report, Dr. Eingorn reviewed appellant's medical treatment. He first saw him on February 19, 2004. Appellant related that he "injured his shoulder approximately two years prior after falling off a chair in November 2003" and that his shoulder had been injured two years ago. Dr. Eingorn detailed physical findings on examination of appellant, stating:

> "At this time, [appellant] is suffering form multiple complaints from his injury which is rotator cuff arthropathy with recurrent symptoms of shoulder myofascitis. [He] also has findings of foot pain, etiology unknown, possible degenerative joint disease, rule out stress fracture. [Appellant] did suffer a fracture of his fifth metatarsal which has gone on to heal at this time and may have left him with post[-]traumatic inflammatory state which may not be curable at this time."

Subsequent to the May 23, 2005 hearing, appellant submitted a June 15, 2005 report by Dr. Eingorn diagnosing persistent triceps tendinitis.

On July 18, 2005 the Office received additional evidence. A November 18, 2003 x-ray interpretation revealed moderate spondylosis and moderate degenerative disease at C4-5 with mild degenerative hypertrophic disease of the thoracic and lumbar spines. The report noted no change from a June 2, 2003 x-ray interpretation.

By decision dated August 12, 2005, the Office hearing representative affirmed the denial of appellant's claim, and modified it to reflect that the November 18, 2003 incident occurred as alleged. He found that the evidence established the existence of spinal degenerative disc disease and right shoulder distal supraspinatus and impingement syndrome. However, there was insufficient rationalized medical evidence explaining the causal relationship between the

diagnosed medical conditions and the November 18, 2003 employment incident. The hearing representative noted that appellant had sustained a right shoulder, thoracic and cervical disc condition due to a December 18, 2001 employment injury[1] and a fractured left foot in October 2003. He found that the record was devoid of any medical evidence explaining whether the November 18, 2003 employment incident exacerbated or aggravated appellant's preexisting foot, shoulder or back conditions.

Subsequent to the decision appellant submitted an August 10, 2005 treatment note from Dr. Eingorn, who reported normal shoulder range of motion. He noted that appellant continued to have pain in his left foot and right shoulder.

In a letter dated December 15, 2005, appellant's counsel requested reconsideration and submitted a November 30, 2005 report of Dr. Eingorn, who related treating appellant for "persistent symptoms of left foot pain status postfracture of the left foot and persistent pain and tenderness in the right shoulder." He opined that appellant sustained a left foot fracture on November 18, 2003. Dr. Eingorn also opined that appellant's right shoulder impingement syndrome with rotator cuff tendinitis "is reasonably medically certainty related to his work injury dated November 18, 2003."

By decision dated March 16, 2006, the Office denied modification of the August 12, 2005 decision.

In a letter dated March 17, 2006 appellant's counsel filed a request for reconsideration and submitted a January 26, 2006 report by Dr. Javier G. Taboada, a Board-certified neurologist and psychiatrist. Dr. Taboada diagnosed right shoulder impingement injury and back and neck sprains/strains. He noted that appellant fell from a broken chair on November 18, 2003.

By decision dated June 21, 2006, the Office denied further merit reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[3]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment

[1] The file number was listed as 02-2019823.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

incident that is alleged to have occurred. The second component is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.[4]

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.[5] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant[6] and must be one of reasonable medical certainty,[7] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant fell out of his chair on November 18, 2003 in the performance of duty. The medical evidence submitted diagnosed spinal degenerative disc disease and right shoulder distal supraspinatus and impingement syndrome. The Office denied appellant's claim finding that the medical evidence was insufficient to establish that the November 18, 2003 employment incident caused or aggravated his back, neck, shoulder or foot conditions.

Dr. Nolan, a treating Board-certified orthopedic surgeon, diagnosed a fracture left foot due to an October 2003 injury. In the various treatment notes, he addresses appellant's persistent foot pain. However, Dr. Nolan did not specifically refer to the November 18, 2003 employment incident accepted in this case. His references to an October 2003 injury does not reflect an accepted history. Dr. Nolan's opinion is insufficient to support causal relationship as he did not attribute the diagnosed left foot conditions to the accepted incident.

Dr. McEliece, a treating Board-certified neurological surgeon, noted that appellant had returned to a modified position in 2003 following a December 2001 employment injury. He reported that appellant broke his ankle and foot due to an October 2003 fall at work and that he injured himself again in November 2003 when the chair collapsed. Dr. McEliece noted that appellant fell backwards out of the chair, landing "on his head, neck and back while he struck his foot on the table, reinjuring this area." Diagnoses included cervical, thoracic, lumbar, shoulder and foot pain syndrome secondary to trauma with depression, presumably secondary to all of the above." Dr. McEliece stated that the fall also exacerbated "all of [appellant's] original problems to an insupportable level of pain." However, the contempory medical records do not reflect that appellant claimed striking his foot on a table on November 18, 2003. He did not fully explain how appellant's diagnosed conditions were caused or aggravated by the incident of November 18, 2003. Moreover, Dr. McEliece's opinion appears to be equivocal as he states that

[4] *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[7] *John W. Montoya*, 54 ECAB 306 (2003).

[8] *Judy C. Rogers*, 54 ECAB 693 (2003).

the diagnosed conditions were "presumably secondary to trauma." To the extent that appellant sustained prior injuries at work, Dr. McEliece did not explain how appellant's preexisting conditions were contributed to by the accepted incident in this claim.

Dr. Eingorn noted that appellant sustained an injury in November 2003 when his chair broke. In an initial report dated February 19, 2004, Dr. Eingorn indicated that appellant experienced persistent pain and tenderness in his right shoulder" since the November 18, 2003 injury. Diagnoses include, a left shoulder rotator cuff impingement syndrome, "most likely a subluxation and dislocation event," persistent impingement syndrome symptoms and persistent left foot pain and tenderness. On March 10, 2004 Dr. Eingorn noted a shoulder MRI scan "showed rotator cuff arthropathy and AC joint arthritis mild with no tear." He did not address how the arthritis or arthropathy were caused or contributed to by the November 18, 2003 incident. In a May 18, 2005 report, Dr. Eingorn related that he began treating appellant on February 19, 2004. At that time, appellant related that he "injured his shoulder approximately two years prior after falling off a chair in November 2003" and that his shoulder had been injured two years ago. Dr. Eingorn provided physical findings during his treatment of appellant. He opined that appellant's injury caused multiple complaints including a right shoulder rotator cuff arthropathy and foot pain of unknown origin. On November 30, 2005 Dr. Eingorn stated that he had treated appellant for "persistent symptoms of left foot pain status postfracture of the left foot and persistent pain and tenderness in the right shoulder." He opined that appellant sustained a left foot fracture on November 18, 2003. As noted, however, appellant did not claim a left foot injury on that day and the contemporous medical record did not reflect treatment to his left foot following the incident. Dr. Eingorn also opined that appellant's right shoulder impingement syndrome with rotator cuff tendinitis "is reasonably medically certainly related to his work injury dated November 18, 2003." While he concluded that his foot, shoulder and back conditions were due to the November 18, 2003 employment incident, Dr. Eingorn failed to explain how the objective evidence, medical history and physical findings lead to his stated conclusions. A November 18, 2003 x-ray interpretation reported no changes in appellant's cervical, thoracic and lumbar spines from a June 2, 2003 x-ray interpretation. The record also contains a March 1, 2004 MRI scan which revealed no evidence of any full thickness rotator cuff tear, distal supraspinatus tendonopathy or tendinitis. In addition, the record reflects that appellant had sustained a recent injury involving his ankle and foot in October 2003. Dr. Eingorn did not provide any rationale explaining how these preexisting conditions were aggravated by the November 18, 2003 employment incident. The Board has long held that medical opinions not containing rationale on causal relation are of diminished probative value and are generally insufficient to meet appellant's burden of proof.[9] As Dr. Eingorn failed to provide a rationalized medical report, the Board finds his reports insufficient to establish the claim.

There is insufficient medical evidence to establish a causal relationship between appellant's foot, neck, back and shoulder conditions and the accepted November 18, 2003 employment incident. The evidence fails to address how his preexisting conditions were aggravated by the accepted incident. Appellant was advised as to the medical evidence required

[9] *Sedi L. Graham*, 57 ECAB ___ (Docket No. 06-135, issued March 15, 2006). (Medical form reports and narrative statements merely asserting causal relationship cannot discharge appellant's burden of proof).

to establish his claim. He failed to submit rationalized medical evidence. An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claim conditions and his employment.[10] To establish causal relationship he must submit a physician's report in which the physician reviews those factors of employment identified by appellant as causing his conditions and, taking these factors into consideration as well as findings upon examination and his medical history, explains how these employment factors caused or aggravated any diagnosed conditions and present medical rational in support of that opinion.[11] Appellant failed to meet his burden of proof.

The Board finds that appellant did not submit sufficient medical evidence to establish his right shoulder, neck, back or foot conditions while in the performance of duty on November 18, 2003.

LEGAL PRECEDENT -- ISSUE 2

The Act[12] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[13] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[14]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[15]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[16] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office

[10] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[11] *Robert Broome*, 55 ECAB 339 (2004).

[12] 5 U.S.C. §§ 8101 *et seq.*

[13] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ___ (Docket No. 06-121, issued June 6, 2006).

[14] 20 C.F.R. § 10.605.

[15] 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

[16] 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB ___ (Docket No. 06-452, issued May 3, 2006).

will deny the application for reconsideration without reopening the case for a review on the merits.[17]

ANALYSIS -- ISSUE 2

Appellant's March 17, 2006 request for reconsideration neither showed that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered. His counsel recited the law as it relates to his burden in establishing fact of injury and contended that appellant met his burden of proof. However, appellant failed to show how the Office erred in its application of a specific point of law. He also failed to advance a relevant legal argument not previously considered. Counsel merely disagreed with the Office's conclusion. The Board finds that he has failed to satisfy either of the first two requirements under section 10.606(b)(2).

Appellant also failed to satisfy the third requirement listed in section 10.606(b). He submitted a January 26, 2006 report by Dr. Taboada who diagnosed right shoulder impingement injury and back and neck sprains/strains. Dr. Taboada noted that appellant fell from a broken chair on November 18, 2003. While this is new evidence, he provided no discussion of how these medical conditions were causally related to the November 18, 2003 employment incident. The issue to be resolved is whether appellant's medical conditions were caused or aggravated by his November 18, 2003 employment injury. As the report contained no supporting rationale explaining how his medical conditions were causally related, it is not relevant to the issue at hand.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury to his shoulder, back, neck and foot in the performance of duty causally related to his November 18, 2003 employment incident. The medical evidence he submitted was insufficient to establish causal relationship. The Board further finds that the Office properly denied appellant's request for reconsideration of the merits of the claim.

[17] 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB ___ (Docket No. 05-677, issued July 13, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 21 and March 16, 2006 are affirmed.

Issued: March 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board