

**Dr. Gao United States Department of Labor
Employees' Compensation Appeals Board**

L.S., Appellant

and

**U.S. POSTAL SERVICE, RADIO CITY
STATION, New York, NY, Employer**

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**Docket No. 08-94
Issued: January 16, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 10, 2007 appellant filed a timely appeal from a June 18, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim that he sustained an injury in the performance of duty on December 13, 2006. He also appealed a nonmerit decision dated September 17, 2007, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on December 13, 2006, as alleged; and (2) whether the Office properly denied further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 13, 2006 appellant, then a 50-year-old city carrier, filed a traumatic injury claim alleging that he injured his neck on that date while lifting mail. The employing

establishment controverted the claim on the grounds that he lifted the tray with one hand instead of both hands as instructed.

In support of his claim, appellant submitted medical scripts and a December 13, 2006 hospital emergency room report indicating that x-rays had been taken of his neck and interpretations of the x-rays would be issued later.

In a letter dated December 19, 2006, the Office informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised to submit medical and factual evidence to support his claim and was given 30 days to provide the requested information.

By decision dated January 22, 2007, the Office denied appellant's claim as he failed to submit evidence to support his claim in the time allotted. Following the January 22, 2007 decision, it received additional medical and factual information. In an undated statement, appellant related that he felt a sharp pain in his neck on the right side while picking up mail on December 13, 2006. He informed his supervisors of his sharp neck pain and then completed his deliveries. Upon returning to the station, appellant informed Ms. Korger, a supervisor, about his neck pain. Ms. Korger referred him to Claudia Jordan, a supervisor, who sent him to the hospital.

In a January 5, 2007 report, Dr. Juan J. Fernandez-Madrid stated that he saw appellant for right sternoclavicular joint pain that had been asymptomatic until he was lifting mail on December 13, 2006. A physical examination revealed tenderness, swelling on the sternoclavicular joint, right neck pain, right shoulder internal rotation pain and right lateral rotation pain. Dr. Fernandez-Madrid diagnosed right sternoclavicular joint subluxation. In a January 5, 2007 disability certificate, he indicated that appellant was totally disabled for the period December 13, 2006 through January 7, 2007. He released appellant to light-duty work on January 8, 2007 with lifting restrictions of no more than 10 to 15 pounds.

In a January 19, 2007 attending physician's state workers' compensation form, appellant was diagnosed with a thoracic sprain.¹

On January 26, 2007 appellant requested a review of the written record by an Office hearing representative. He submitted medical and factual evidence including January 26 and February 26, 2007 reports of Dr. Fernandez-Madrid; December 13, 2006 hospital reports; the December 14, 2006 clavicle and chest x-ray interpretations by Dr. James Marino, a radiologist; and an April 3, 2007 magnetic resonance imaging (MRI) scan. Dr. Marino reported a normal right clavicle with no evidence of arthritis based on the December 14, 2006 x-ray interpretation. The December 14, 2006 chest x-ray was interpreted by Dr. Marino as having no active infiltrate.

On January 26, 2007 Dr. Fernandez-Madrid stated that appellant injured himself on December 13, 2006 and that he continued to have right shoulder pain. He reported an unchanged physical examination. Dr. Fernandez-Madrid diagnosed right sternoclavicular joint subluxation. On February 26, 2007 he diagnosed right sternoclavicular joint subluxation and noted that

¹ There is no physician's name or signature on the form, but St. Vincent's Midtown Hospital is noted on the form.

appellant continued to work with pain in his right shoulder. A physical examination revealed “pain on motion of the shoulder.”

The April 3, 2007 MRI scan revealed findings, which were most suggestive of osteoarthritis of the right sternoclavicular joint and the possibility of an inflammatory arthropathy or septic arthritis cannot be completely excluded.

By decision dated May 3, 2007, the Office hearing representative affirmed the denial of appellant’s claim. He found that the medical evidence failed to establish that appellant sustained a chest or neck condition causally related to accepted December 13, 2006 employment incident.

On May 22, 2007 appellant requested reconsideration. On March 12, 2007 Dr. Ossama Maloule, an internist, related that appellant was seen for sternoclavicular pain which had been present for three months. Appellant denied any fall or trauma but noted he worked hard using the right arm which might have led to his injury.

In a May 9, 2007 report, Dr. Bernard D. Nidus, an internist, diagnosed right sternoclavicular joint osteoarthritis, which had been symptomatic since December 2006. He noted that this condition limited appellant’s “range of motion and force he can exert with his right arm.” On May 16, 2007 Dr. Nidus diagnosed swelling and pain in the right sternoclavicular joint. He reported that appellant was first seen on March 12, 2007 for treatment of this condition which had been present for the prior three months and while he was performing hard work. Appellant related that he lifted heavy loads with his right arm.

By decision dated June 18, 2007, the Office denied modification of the May 3, 2007 decision. It found that the medical evidence did not adequately explain how the diagnosed conditions were causally related to the December 13, 2006 employment incident.

Appellant requested reconsideration, on June 22, 2007, he submitted a June 11, 2007 report by Eli Fontanilla, physical therapist, and reports dated May 18 to June 11, 2007 from Dr. Xiao-ke Gao, a treating Board-certified neurologist, who diagnosed right shoulder osteoarthrosis, right shoulder tendinitis and clavicle strain. Dr. Gao noted that appellant stated that he had injured himself at employing establishment while reaching “out to pick up some meals and in the process, he injured his shoulder.” He opined that appellant was partially disabled as a result of the December 13, 2006 incident. Appellant had right shoulder pain and difficulty raising his right arm.

On a June 11, 2007 Mr. Fontanilla diagnosed right elbow epicondylitis and ulnar neuropathy. Appellant attributed his condition to his employment. He related that “he must have pulled something over his [right] shoulder from pulling and pushing mail carts.”

On a June 11, 2007 Dr. Gao diagnosed right epicondylitis, ulnar neuropathy and right subluxation of the sternoclavicular joint. A physical examination revealed bilateral epicondyle tenderness, 90 degrees right shoulder abduction and intact sensory examination.

By decision dated September 17, 2007, the Office denied his request for reconsideration, finding that none of the medical reports were relevant to his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.²

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.³ An award of compensation may not be based on appellant's belief of causal relationship. 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 a causal relationship.⁴

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁵ The opinion of the physician must be based on a complete factual and medical background of the claimant⁶ and must be one of reasonable medical certainty⁷ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained a traumatic injury on December 13, 2006. The Office accepted that the December 13, 2006 mail lifting incident occurred as alleged. However, appellant did not meet his burden of proof in establishing the relationship of his claimed neck or sternoclavicular conditions and the

² *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *See Paul Foster*, 56 ECAB 208 (2004); *see also Katherine J. Friday*, 47 ECAB 591 (1996).

⁴ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁵ *G.G.*, 58 ECAB ____ (Docket No. 06-1564, issued February 27, 2007); *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁶ *L.D.*, 58 ECAB ____ (Docket No. 06-1627, issued February 8, 2007); *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ *Roy L. Humphrey*, 57 ECAB 238 (2005); *John W. Montoya*, 54 ECAB 306 (2003).

⁸ *J.M.*, 58 ECAB ____ (Docket No. 06-2094, issued January 30, 2007); *Judy C. Rogers*, 54 ECAB 693 (2003).

lifting incident. The medical evidence does not provide a rationalized narrative explanation of how the December 13, 2006 lifting mail incident caused or aggravated his diagnosed conditions.

On March 12, 2007 Dr. Maloule related that appellant was seen for sternoclavicular pain. She stated that appellant denied any fall or trauma but related that working with his right arm may have caused his injury. In a May 9, 2007 orthopedic surgery outpatient report, Dr. Baskies diagnosed right sternoclavicular arthritis. On May 9, 2007 Dr. Nidus diagnosed severe right sternoclavicular joint osteoarthritis. In a May 16, 2007 report, he diagnosed swelling and pain in the right sternoclavicular joint. Appellant informed Dr. Nidus that he lifted heavy loads with his right arm. None of these reports provide the physicians opinion as to the cause of appellant's diagnosed conditions or address the December 13, 2006 mail lifting incident. The Board has long held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹ These reports are insufficient to establish that appellant sustained a neck or sternoclavicular condition as a result of the December 13, 2006 employment incident.

On January 5, 2007 Dr. Fernandez-Madrid diagnosed a right sternoclavicular joint subluxation. He noted that appellant was seen for right sternoclavicular joint pain that had been asymptomatic until appellant lifted mail on December 13, 2006. The Board has held that the opinion of a physician that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting medical rationale, to establish causal relationship.¹⁰ Dr. Fernandez-Madrid did not adequately address how appellant's right sternoclavicular condition was caused or contributed to by the lifting incident. His opinion is insufficient to establish a causal relationship between appellant's right sternoclavicular joint pain and the accepted December 13, 2006 incident.

The Board notes that the remaining medical evidence of record includes hospital records and x-ray and MRI scan reports. None of the diagnostic studies provide any opinion as to the cause of appellant's alleged neck or sternoclavicular conditions. They are of diminished probative value and are insufficient to establish appellant's claim.¹¹

The Board finds that appellant submitted insufficient rationalized medical evidence to establish the causal relationship asserted in this case.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹² the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not

⁹ A.D., 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006).

¹⁰ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹¹ *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

¹² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.¹⁵

ANALYSIS -- ISSUE 2

The Office denied appellant's traumatic injury claim by decisions dated January 22, May 3 and June 18, 2007, finding that he submitted insufficient evidence to establish causal relationship. Appellant requested reconsideration on June 22, 2007. The underlying issue is whether he established a causal relationship between the accepted December 13, 2006 employment incident and the claimed neck or sternoclavicular conditions. To be relevant, the evidence must address this issue.¹⁶

Appellant submitted reports from Dr. Gao, an attending Board-certified neurologist, and June 11, 2007 report by Mr. Fontanilla, a physical therapist, who's report does not constitute a basis for reopening appellant's claim for a merit review. A physical therapist is not a physician as defined under the Act.¹⁷ The Board finds that Mr. Fontanilla's report does not constitute competent medical evidence as a physical therapist is not a physician under the Act. This evidence is not relevant to the medical issue of whether appellant sternoclavicular condition is causally related to the accepted December 13, 2006 employment incident.

However, Dr. Gao diagnosed right shoulder osteoarthritis, right shoulder tendinitis and clavicle strain. He noted that appellant injured himself at work while reaching out at work. Dr. Gao found that appellant was partially disabled as a result of the December 13, 2006 employment incident due to right shoulder pain and had difficulty raising his right arm. The Board notes that Dr. Gao's description of appellants employment incident corresponds with the history on appellant's claim form. Dr. Gao also provided reasoning for his opinion that appellant's diagnosed condition was due to his employment incident. The Office found that this report was not relevant. The Board notes that the reports from Dr. Gao offer medical opinion evidence on the causal relationship, the reason for which the Office denied appellant's claim on January 22, May 3 and June 18, 2007. Therefore, these reports constitute pertinent new and relevant evidence. As appellant has submitted relevant and pertinent new evidence not

¹³ 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

¹⁶ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁷ 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357.

previously considered by the Office, under 20 C.F.R. § 10.606(b)(2)(iii), he is entitled to a review of the merits of the claim. The case will be remanded to the Office for a merit decision.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on December 13, 2006, as alleged. The Board further finds that the Office improperly denied appellant's May 22 and June 22, 2007 requests for reconsideration without reviewing the case on the merits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 18 and May 3, 2007 are affirmed. The Office decision dated September 17, 2007 is set aside and the case remanded for further action consistent with this decision.

Issued: January 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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