

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

O.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Boston, MA, Employer)

Docket No. 07-1624

Issued: November 27, 2007

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Program's decision dated April 16, 2007, which denied his request for reconsideration on the grounds that the evidence was insufficient to warrant review of the merits and a June 22, 2006 merit decision denying his left shoulder claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim

ISSUES

The issues are: (1) whether appellant established that he sustained an occupational disease in the performance of duty; (2) whether he established that he sustained a traumatic injury in the performance of duty; and (3) whether the Office properly denied his request for reconsideration.

FACTUAL HISTORY

On March 30, 2005 appellant, then a 42-year-old housekeeping aide, filed an occupational disease claim alleging that he sustained a left shoulder injury due to repetitive use of his arms in the performance of duty. He first became aware of his injury on March 9, 2005. On April 1, 2005 the Office requested additional information from appellant.

The Office received a March 9, 2005 medical report from Dr. Arthur Robins, M.D., who diagnosed left shoulder strain and repetitive motion/overuse syndrome. Dr. Robins noted that appellant had left shoulder pain when mopping floors or working with arms overhead or positional changes during sleep. In a March 30, 2005 note, a nurse practitioner at the Martha Eliot Health Center stated that appellant was being treated for shoulder pain due to overuse.

On April 8, 2005 appellant filed a traumatic injury claim alleging that on March 9, 2005 he felt sharp and tingling pain in his left shoulder when he was mopping the floor.

Additional information was received by the Office. Appellant submitted emergency department notes from March 10, 2005 which recorded appellant's persistent left shoulder pain for the last two months. In a March 16, 2005 note, Dr. Barsam Kasravi, M.D., diagnosed appellant with left shoulder inflammation and muscle pain due to repetitive use of his arms and excused appellant from repetitive arm motion for six weeks. In a March 17, 2005 note, Dr. Frederico Saldana, M.D., diagnosed appellant with muscular/shoulder pain due to repetitious movement and chostochondritis. The Office also received progress notes from the Martha Eliot Health Center dated March 1, 14 and 22 2005. In an April 4, 2005 note, Dr. Kasravi noted that he "discussed with patient that any motion could have caused this, on the job, at home, etc." In an April 4, 2005 attending physician's report, he diagnosed appellant with left shoulder tendinitis, bursitis and stated that he did not know if the condition was caused by any employment activity as any repetitive motion could cause it. A June 8, 2005 magnetic resonance imaging (MRI) scan report diagnosed partial intrasubstance interstitial tear of the supraspinatus tendon, intra-articular biceps tear and possible labral tear.

In a June 28, 2005 decision, the Office denied appellant's occupational and traumatic injury claims for left elbow and shoulder injuries on the grounds that the medical evidence did not demonstrate that his medical conditions were related to his employment.

On July 14, 2005 appellant requested an oral hearing and review of the written record. He rescinded his oral hearing request and asked for a review of the written record.

Additional information was received by the Office. In an April 13, 2005 visit note, Dr. Ronal Nasif, an orthopedic surgeon, diagnosed left shoulder sprain and left shoulder tendinitis. He reported that appellant was reaching over his head at work on March 9, 2005 and felt a sharp pain in his left shoulder. The Office also received physical therapy notes. An April 13, 2005 physician's report completed by a physician's assistant diagnosed left shoulder sprain due to repeated motion. The Office also received notes from a physician's assistant dated February 7, April 18 and June 27, 2006.

By decision dated June 22, 2006, the Office denied modification of the June 28, 2005 decision on the grounds that the medical evidence was insufficient to establish that appellant sustained an injury in the performance of duty.

On January 8, 2007 appellant requested reconsideration. In a July 13, 2006 visit note, Dr. Timothy Foster, Board certified in orthopedic surgery, noted that appellant's MRI scan revealed partial thickness rotator cuff tear consistent with impingement syndrome. He also noted that appellant had a "work-related injury" to his left shoulder. In a June 8, 2006 note, Dr. Pascale Carbonara, Board-certified in internal medicine, stated that appellant was not able to lift carry or push 20 pounds with his left arm.

On April 16, 2007 the Office denied reconsideration on the grounds that the evidence was insufficient in requiring further merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed, or stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant.¹

While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.²

ANALYSIS -- ISSUE 1

Appellant alleged that his left elbow condition is causally related to factors of his federal employment which began on March 9, 2005. In order to establish that appellant sustained an injury in the performance of duty he must submit medical evidence which establishes the presence of a disease or condition. There is no medical evidence of a left elbow condition. The medical evidence of record addresses appellant's left shoulder condition. Without establishing the presence of a disease or condition appellant cannot establish that he sustained an injury in the performance of duty. The Board finds that appellant has submitted insufficient medical evidence to establish that he sustained a left elbow condition causally related to his federal employment.

¹ *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB ____ (Docket No. 05-715, issued October 6, 2005).

² *Morris Scanlon*, 11 ECAB 384, 385 (1960).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and 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.³

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing that he or she sustained an injury while in the performance of duty.⁵ In order to determine whether an employee actually sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.⁶ Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁷

ANALYSIS -- ISSUE 2

Appellant alleged that he sustained a left shoulder condition when he was mopping the floor on March 9, 2005. The Office did not accept that the March 9, 2005 employment incident occurred as alleged due to inconsistent factual statements in the medical evidence. However, the employing establishment did not controvert that the incident occurred. The Board finds that appellant was mopping the floor on March 9, 2005. The issue is whether the accepted employment incident caused appellant's left shoulder conditions. The Board finds that the medical evidence fails to establish a causal relationship between the accepted incident and appellant's diagnosed condition.

The medical evidence establishes the presence of multiple left shoulder conditions including strain, inflammation, tendinitis, bursitis and partial tendon tears. However, the medical

³ *Anthony P. Silva*, 55 ECAB 179 (2003).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁶ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁷ *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Id.*

evidence does not establish that the employment incident, mopping the floor, was the proximate cause of appellant's left shoulder conditions. Dr. Robins diagnosed left shoulder strain and repetitive motion/overuse syndrome and noted that appellant had shoulder pain while mopping floors but did not explain how appellant's work duties caused or contributed to his shoulder strain. The June 8, 2005 MRI scan report provided multiple diagnosis but no opinion as to causal relationship. Dr. Saldana diagnosed appellant with shoulder pain due to repetitious movement but did not identify whether the repetitious movement was the employment incident. Dr. Kasravi stated that appellant had left shoulder inflammation due to repetitive use of his arms but did not identify whether the repetitious use was related to his employment. He also stated that he did not know if the condition was caused by any employment activity and opined that any motion could have caused his condition. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.⁸ The medical reports from physician assistants, nurse practitioners and physical therapists are not relevant as they are not "physicians" as defined under the Act.⁹ Therefore, their opinions are of no probative value to establish causal relation. None of the medical reports establish that appellant's condition was causally related to the employment incident.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, 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.¹⁰

ANALYSIS -- ISSUE 3

The Office will reopen a case for further merit review if appellant shows that the Office erroneously applied or interpreted a specific point of law or advances a relevant legal argument not previously considered by the Office. Appellant did not raise any legal argument in his request for reconsideration nor did he contend that the Office erroneously interpreted a point of law. The Office will reopen a case if appellant submits relevant and pertinent new evidence not previously considered by the Office. Appellant submitted additional evidence but it is not relevant or pertinent. As noted, the reports from a physician's assistant are of no probative value as a physician's assistant is not a "physician" under the Act.¹¹ Neither of the notes from Dr. Foster and Dr. Carbonara addressed the underlying issue of whether the employment incident caused or contributed to appellant's left shoulder condition. Dr. Foster reviewed an MRI scan and diagnosed a torn rotator cuff. Dr. Carbonara imposed work restrictions for appellant's left

⁸ *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁹ 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).

¹⁰ 20 C.F.R. § 10.606(b)(2)(iii) (2004).

¹¹ 5 U.S.C. § 8101(2).

arm. Neither physician provided any history of appellant mopping floors on March 9, 2005. The physicians did not address how appellant's left shoulder condition was caused or contributed to by any factor of his federal employment. The evidence submitted is not relevant and pertinent evidence which would require the Office to reopen the case.

As appellant is not entitled to a review of the merits of his claim, the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained an occupational disease or traumatic injury in the performance of duty and that the Office properly denied merit review.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2007 and June 22, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 27, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board