

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 09-659
Issued: October 6, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 8, 2008 appellant filed a timely appeal from a March 14, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for compensation and a nonmerit decision dated September 25, 2008 denying his request for reconsideration. Pursuant to 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 met his burden of proof in establishing that his neck and shoulder conditions were sustained in the performance of duty, causally related to factors of his federal employment; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 8, 2007 appellant, then a 57-year-old letter carrier, filed an occupational disease claim alleging that he experienced right neck and shoulder pain as a result of delivering

mail. He indicated that he first became aware of this condition and its relationship to his work on July 1, 2006.

On November 30, 2007 the Office notified appellant that the evidence submitted was insufficient to establish his claim. It advised appellant to identify the specific employment duties he believed caused or contributed to his condition and provide a medical narrative from his treating physician, which contained a diagnosis and a rationalized opinion as to the cause of his condition.

In response to the Office's request, appellant submitted a June 14, 2006 right hip x-ray interpretation and an August 22, 2006 lumbar spine x-ray interpretation by Dr. Lawrence Glorioso, an examining Board-certified diagnostic radiologist, physical therapy notes dated August 30, 2006 from Quintin Cole, a physical therapist, and his statement. Dr. Glorioso diagnosed spondylosis, facet arthrosis, inferior vena cava filter and atherosclerosis in the August 22, 2006 x-ray interpretation. Appellant, in his statement, noted that he lost his balance while delivering mail on July 1, 2006 and pulled himself up slowly by his right arm. He stated that the following morning he had horrible pain in his right thigh, but the pain subsided to enable him to go to work. According to appellant the pain has persisted and approximately five months ago he developed incessant pain on the right side of his neck and in his right shoulder.

In a March 14, 2008 decision, the Office denied appellant's claim for compensation finding that the medical evidence did not establish that he sustained a neck and shoulder injury causally related to his employment.

Subsequent to the decision, the Office received a December 17, 2007 progress note and June 10, 2008 report from Dr. Robert L. Shackleton, a treating Board-certified orthopedic surgeon, who in a December 17, 2007 progress note, related that a magnetic resonance imaging (MRI) scan results showed right shoulder pain. In the June 10, 2008 report, Dr. Shackleton reported that appellant attributed his right shoulder problems to carrying a heavy bag for a number of years. He reported findings from a right shoulder MRI scan which included advanced glenohumeral joint osteoarthritis and evidence of a supraspinatus tendon full thickness tear. In concluding, Dr. Shackleton stated that appellant was "fairly adamant that the problems with the right shoulder have all been caused by his conditions at work." He noted that the MRI scan showed that the right shoulder problems were chronic and not an acute condition.

On June 20, 2008 appellant requested reconsideration and submitted a May 19, 2008 right shoulder MRI scan of his right shoulder in support of his request. The report reflects advanced right glenohumeral joint osteoarthritis, right humeral head avascular necrosis, probable chronic full supraspinatus tendon thickness tear, suspected superior labral anterior to posterior tear and osteophytic spurring on the acromion undersurface.

By decision dated September 26, 2008, the Office denied appellant's request for merit review on the grounds that he failed to raise a substantive legal question or present relevant evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.³

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 employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁴ The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e.*, medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to the claimant's diagnosed condition.⁵ To be of probative value, the opinion of the physician must be based on a complete factual and medical background of the claimant, 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 factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

Appellant's work duties as a letter carrier are not in dispute, but the issue is whether his work activities caused or contributed to his right neck and shoulder conditions. The Board finds that he has submitted insufficient medical evidence to establish that his shoulder or neck conditions were caused or aggravated by his duties as a letter carrier.

Appellant's burden of proof includes the submission of rationalized medical opinion evidence addressing causal relationship. He has not submitted sufficient evidence in support of his claim for right neck or shoulder conditions. There is no explanation by a physician how

¹ 5 U.S.C. §§ 8101-8193.

² *C.S.*, 60 ECAB ___ (Docket No. 08-1585, issued March 3, 2009).

³ *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *A.C.*, 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008); *Michael R. Shaffer*, 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

⁵ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

⁶ *D.G.*, 59 ECAB ___ (Docket No. 08-1139, issued September 24, 2008). *Leslie C. Moore*, 52 ECAB 132 (2000); *see also Ern Reynolds*, 45 ECAB 690 (1994).

factors of appellant's employment caused or contributed to his right neck and shoulder conditions or aggravated a preexisting medical condition.

The record contains physical therapy reports, but these reports have no weight or probative value as medical evidence as physical therapists are not physicians under the Act and they have not been signed or approved by a physician.⁷ Section 8101(2) of the Act provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law.⁸

Appellant also submitted two diagnostic reports. As these reports do not contain any opinion on causal relationship, they have no probative value in establishing causal relationship.⁹

Appellant expressed his belief that his alleged right neck and shoulder conditions resulted from his duties as a letter carrier. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁰ Further, the belief that the disease or condition was caused or aggravated by employment factors or incidents is also not sufficient to establish a causal relationship.¹¹ Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.

The Office advised appellant that it was his responsibility to provide a comprehensive medical report which described his symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of his conditions. Appellant failed to do so. As there is no probative, rationalized medical evidence addressing how his claimed conditions were caused or aggravated by his employment, he has not met his burden of proof to establish that he sustained an occupational disease in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

The Act¹² 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

⁷ *A.C.*, *supra* note 4. (Records from a physical therapist do not constitute competent medical opinion in support of causal relation as a physical therapist is not a physician as defined under the Act).

⁸ 5 U.S.C. § 8101(2). *See Thomas O. Bouis*, 57 ECAB 602 (2006).

⁹ *See Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ *R.T.*, 60 ECAB ____ (Docket No. 08-408, issued December 16, 2008).

¹¹ *R.T.*, *supra* note 10; *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹² 5 U.S.C. § 8101 *et seq.*

¹³ *Id.* at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

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

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted a December 17, 2007 progress note and June 10, 2008 report from Dr. Shackleton, a treating Board-certified orthopedic surgeon and a May 19, 2008 right shoulder MRI scan. Dr. Shackleton did not address the relevant issue in either his December 17, 2007 progress note or June 10, 2008 report, namely, whether appellant's right shoulder condition was causally related to his employment.¹⁸ Rather, he stated that appellant attributed his condition to his employment duties in his June 10, 2008 report and offered no opinion as to the cause of his right shoulder pain in the December 17, 2007 progress note. The May 19, 2008 report of an MRI scan of the right shoulder reflected advanced right glenohumeral joint osteoarthritis, right humeral head avascular necrosis, probable chronic full supraspinatus tendon thickness tear, suspected superior labral anterior to posterior tear and

¹⁴ 20 C.F.R. § 10.605.

¹⁵ *Id.* at § 10.606. See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁶ *Id.* at § 10.607(a). See *Joseph R. Santos*, 57 ECAB 554 (2006).

¹⁷ *Id.* at § 10.608(b). See *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹⁸ *A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

osteophytic spurring on the acromion undersurface. The Board finds that Dr. Shackleton's December 17, 2007 progress note and June 10, 2008 report and the May 19, 2008 MRI scan do not constitute relevant and pertinent new evidence not previously considered by the Office.¹⁹ Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

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 met his burden of proof in establishing that he sustained an injury in the performance of duty. The Board further 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).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 25 and March 14, 2008 are affirmed.

Issued: October 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ *Susan A. Filkins, supra* note 15.