

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

A.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Coatesville, PA, Employer)

Docket No. 10-2396
Issued: July 18, 2011

Appearances:
Claudia Moore, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 27, 2010 appellant, through his representative, filed a timely appeal of an April 8, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision and a September 14, 2010 nonmerit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a left shoulder injury causally related to August 18, 2009 employment incident; and (2) whether the Branch of Hearings and Review properly determined that appellant abandoned his request for an oral hearing.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant stated that he was unclear whether his current shoulder condition was a recurrence of his previously accepted claim or a new injury.

FACTUAL HISTORY

On August 20, 2009 appellant, then a 46-year-old nursing assistant, filed a traumatic injury claim alleging that he injured his left shoulder on August 18, 2009 when struck by a patient. He underwent a magnetic resonance imaging (MRI) scan on January 6, 2010 which demonstrated patchy marrow edema through the humeral head and neck consistent with a bone bruise or comminuted nondisplaced fracture as well as arthritic changes at the acromioclavicular joint. Appellant also had a partial thickness undersurface tear of the supraspinatus tendon and supraspinatus tendinopathy, labral defect and small joint effusion as well as mild subacromial subdeltoid bursitis.

In a narrative statement, appellant noted that he was assaulted by a patient on August 18, 2009 and that he had a prior old shoulder injury. As a result of his prior injury shoulder he had rotator cuff tendon inflammation and impingement. Appellant submitted medical records dated January 20, 2010, noting that he had left shoulder pain since 2007. He was initially struck by a patient in 2007 and sustained a possible nondisplaced greater tuberosity fracture. Appellant underwent surgery in January 2008 and was again assaulted by a patient in October 2009 with worsening of his shoulder pain. Dr. Jonathan Van Kleunen, an orthopedic surgeon, stated that there was no clear single cause for appellant's symptoms. Appellant had a history of cervical disease. His examination was suggestive of labral pathology with minor impingement signs, but MRI scan did not show labral injury, but a partial articular rotator cuff tear with bony edema in the humeral head.

On February 23, 2010 OWCP requested additional factual and medical evidence in support of appellant's claim. It allowed 30 days for a response. Appellant responded that he instructed a belligerent patient not to enter an off-limits room. The patient began cursing and punching, hitting him in the left shoulder. Appellant was on light duty when the injury occurred and he was struck in the same area as his prior injuries. He was unable to receive medical treatment until January 10, 2010 when he visited a Veterans Administration Hospital. Appellant stated that he used narcotics for his preexisting condition and iced his shoulder. He underwent left shoulder surgery on February 25, 2010.

By decision dated April 8, 2010, OWCP denied appellant's claim finding that the medical evidence did not establish that his diagnosed condition was due to the August 18, 2009 employment incident.

Appellant requested an oral hearing on April 27, 2010. He submitted additional medical evidence. The Branch of Hearings and Review informed appellant by letter dated July 14, 2010 that his oral hearing would be held on August 26, 2010 at 10:30 a.m. in Philadelphia, Pennsylvania. Appellant submitted a subpoena request on August 5, 2010.

By decision dated September 14, 2010, the Branch of Hearings and Review determined that appellant abandoned his August 26, 2010 hearing. OWCP's hearing representative found

that appellant failed to attend the hearing or provide notice in advance of his inability to attend. Appellant also failed to provide any reason for his failure to appear.

LEGAL PRECEDENT -- ISSUE 1

OWCP defines a traumatic injury as, “[A] condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected.”²

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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 which is alleged to have occurred.³ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴ 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. 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. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician’s opinion.⁵

ANALYSIS -- ISSUE 1

On August 18, 2009 appellant was assaulted by a patient. Any condition resulting from this incident constitutes a new traumatic injury. At the time of the 2009 incident, he had a preexisting left shoulder condition, due to a previous injury in 2007 for which he underwent surgery. In order for his injury to be considered a recurrence of disability, appellant would have to sustain a spontaneous change in his condition, with no intervening injury. The Board notes that OWCP properly developed his claim as a new traumatic injury.

² 20 C.F.R. § 10.5(ee).

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁵ *James Mack*, 43 ECAB 321 (1991).

OWCP accepted that the August 18, 2009 employment incident occurred as alleged, but found that appellant did not submit sufficient medical evidence to establish an injury resulting from the accepted incident.

An MRI scan dated January 6, 2010 demonstrated patchy marrow edema through the humeral head and neck consistent with a bone bruise or comminuted nondisplaced fracture as well as arthritic changes at the acromioclavicular joint. It also demonstrated a partial thickness undersurface tear of the supraspinatus tendon and supraspinatus tendinopathy, labral defect and small joint effusion as well as mild subacromial subdeltoid bursitis.

Appellant submitted notes from Dr. Van Kleunen noting that he had left shoulder pain since 2007 when he was struck by a patient and sustained a possible nondisplaced greater tuberosity fracture. He underwent surgery in January 2008 due to the 2007 injury. Dr. Van Kleunen noted that appellant was again assaulted by a patient in October 2009 with worsening of his shoulder pain. He stated that there was no clear single cause for appellant's symptoms as he had a history of cervical disease, as well as a physical examination suggestive of labral pathology with minor impingement signs which was not confirmed by the MRI scan. Dr. Van Kleunen did not provide a clear diagnosis of appellant's medical condition following the 2009 incident. He failed to state that appellant's shoulder condition was due to the accepted employment incident of August 18, 2009; rather, he noted a history of an assault in October 2009. As the medical evidence fails to provide a clear diagnosis and an opinion on the causal relationship between appellant's diagnosed condition and his accepted employment incident, the Board finds that he has failed to meet 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

Section 8124(b)(1) of FECA provides:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁶

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.⁷

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.616(a).

OWCP's procedures state:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present --

the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return to case to the DO [district Office].”⁸

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing and on July 14, 2010 that his oral hearing would be held on August 26, 2010 at 10:30 am at the Curtis Center, Suite 715 East, Sixth and Walnut Streets, Philadelphia, Pennsylvania 19106. The record does not reflect that he requested postponement of the hearing prior to the scheduled date of the hearing. Appellant did not appear for the oral hearing. Neither did he provide any notification for the failure to appear within 10 days after the scheduled date of the hearing. Appellant's failure to provide any notification, together with his failure to appear at the scheduled hearing, constituted abandonment of his request for a hearing and the Board finds that OWCP properly so determined.

CONCLUSION

The Board finds that appellant has not submitted sufficient medical evidence to establish that he sustained an employment-related shoulder injury on August 18, 2009. The Board further finds that he abandoned his request for an oral hearing.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

ORDER

IT IS HEREBY ORDERED THAT the September 14 and April 8, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 18, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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