United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 10-1490**
	)	**Issued: March 11, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 11, 2010 appellant, through her attorney, filed a timely appeal from a December 29, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for compensation and an April 5, 2010 decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act and 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 her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether the Office properly denied her request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 9, 2009 appellant, then a 33-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on January 31, 2009 she sustained an injury to her left shoulder when she felt a pull as she was moving a tray of mail onto the long life vehicle (LLV).

On the reverse side of the form, her supervisor indicated by check mark that appellant was injured in the performance of duty, the injury was not caused by a third party, and his knowledge of the facts agreed with statements of her and/or witnesses.

In a February 6, 2009 narrative statement, appellant indicated that after the January 31, 2009 incident, her shoulder got better for about a week but then became extremely sore as the work weeks continued.

In a February 6, 2009 medical report, Dr. Chris Panagopoulos, a treating chiropractor, stated that appellant was moving a tray at work and felt a sharp pain in her shoulder which continued to bother her on a regular basis. He diagnosed left rotator cuff tendinitis, bursitis and radicular pain into her lateral proximal arm. In an April 23, 2009 report, Dr. Panagopoulos reported that appellant's pain was localized to the cervical spine distally and also along the anterior/posterior shoulder with activity. He recommended a cervical and left shoulder magnetic resonance imaging (MRI) scan.

In a March 10, 2009 (Form CA-17), Dr. Panagopoulos stated that appellant was diagnosed with left rotator cuff tendinitis but that she could return to work with no restrictions. He further indicated by check mark that her condition was caused or aggravated by her employment activity.

In a May 12, 2009 report, Dr. Terry L. Cohen, a Board-certified diagnostic radiologist, performed an MRI scan on appellant's left shoulder and cervical spine for the alleged work-related injury that occurred on January 31, 2009. He noted that her left shoulder showed suspect minimal arthritic changes at the acromioclavicular (AC) joint, no rotator cuff tear or gross fibrous labral tear and minimal bursitis involving long head biceps tendon sheath. The cervical MRI scan showed degenerative disc desiccation with no focal disc herniation or spinal stenosis.

A number of request for authorization forms were received from Dr. Gregory Zinni, Board-certified in family medicine, requesting physical therapy, an MRI scan of the neck and left upper extremity and treatment for appellant's shoulder and cervical spine.

By letter dated June 19, 2009, the Office advised appellant that additional factual and medical information was needed in support of her claim. Specifically, it noted that due to factual inconsistencies, it was unable to determine if the injury occurred during one work shift in October 2008, during one work shift on January 31, 2009 or occurred over a period of more than one work shift.

Appellant submitted a June 29, 2009 medical report dictated by Dr. Panagopoulos, reviewed and agreed upon by Dr. Zinni, diagnosing left rotator cuff tendinitis, bursitis. The report stated that she was doing better but that her shoulder and neck pain were slightly aggravated beyond normal at work. Appellant continued to have pain on a regular basis despite her activities of daily living (ADL) almost returning to normal. The report also noted that the same activities and repetitive nature of her job exacerbated the pain but that pain levels remained low. The report recommended that appellant continue working without restrictions unless the problem persisted.

In an undated letter, appellant stated that she hurt her shoulder in a traumatic injury incident in October 2008 and again on January 31, 2009 when she felt a pull in her shoulder as she was moving a tray of mail in the LLV. Regarding an occupational disease claim she explained that she was experiencing pain in her left arm and shoulder when delivering mail for work, approximately three hours each workday.

By decision dated July 23, 2009, the Office denied appellant's claim finding that the medical evidence did not demonstrate that the left shoulder injury was related to the established work-related events. It recognized her claim as alleging a traumatic injury which occurred on January 31, 2009 and further noted that Dr. Panagopoulos, appellant's chiropractor, could not be considered a physician under the Act since his medical report did not provide a diagnosis of subluxation of the spine.

On August 13, 2009 appellant, through her attorney, requested an oral hearing before an Office hearing representative. At a November 4, 2009 hearing, she submitted an October 5, 2009 factual statement alleging that she had initially seen Dr. Zinni, her family doctor, who referred her to Dr. Panagopoulos, a chiropractor in his office for physical therapy. Appellant further stated that her pain had moved up to her neck area.

During the November 4, 2009 hearing, appellant's attorney argued that Dr. Zinni diagnosed appellant's shoulder injury after the MRI scan showed tendinitis and had his on-staff chiropractor, Dr. Panagopoulos, perform the recommended therapy. He also argued that while Dr. Panagopoulos submitted medical reports diagnosing left rotator cuff tendinitis, the April 23, 2009 report was countersigned by Dr. Zinni and the June 29, 2009 report was reviewed and agreed upon by Dr. Zinni. Appellant's attorney argued that, effectively, the medical opinions were those of Dr. Zinni rather than a chiropractor. He also stated that the Office failed to fully develop the case by sending a follow up letter to Dr. Zinni about causal relationship. Finally, appellant's attorney stated that appellant would submit a statement from Dr. Zinni explaining causal relationship. The record was held open for 30 days.

By decision dated December 29, 2009, an Office hearing representative affirmed the Office's July 23, 2009 decision, noting that appellant did not submit the promised report from Dr. Zinni addressing the injury and causation.

On March 1, 2010 appellant, through her attorney, requested reconsideration of the July 23 and December 29, 2009 Office decisions, basing the request on Dr. Zinni's medical report.[1] By letter dated March 12, 2010, the Office informed her attorney that no report from Dr. Zinni had been received.

By decision dated April 5, 2010, the Office denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant

[1] On February 1, 2010 appellant, through her attorney, initially requested an appeal to the Board from the December 29, 2009 Office decision. On March 1, 2010 she also requested reconsideration of the Office decision. On March 19, 2010, after receiving appellant's request for dismissal on March 10, 2010, the Board dismissed the appeal, Docket No. 10-804.

evidence on whether the employment incident caused a specific injury, noting that the report from Dr. Zinni was never received.

LEGAL PRECEDENT -- ISSUE 1

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a 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.[2] 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.[3] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. 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.[4]

ANALYSIS -- ISSUE 1

The Office accepted that the January 31, 2009 incident occurred as alleged. The issue is whether appellant established that the incident caused a left shoulder injury. The Board finds that she did not submit sufficient medical evidence to support that her shoulder injury is causally related to the January 31, 2009 employment incident.[5]

In a February 6, 2009 medical report, Dr. Panagopoulos stated that appellant was moving a tray at work and felt a sharp pain in her shoulder which continued to bother her as weeks passed. He diagnosed left rotator cuff tendinitis, bursitis. In a March 10, 2009 CA-17 form, Dr. Panagopoulos indicated by checkmark that appellant's left rotator cuff tendinitis was caused or aggravated by her employment activities. He also submitted an April 23, 2009 report which

[2] *J.F.*, 61 ECAB ___ (Docket No. 09-1061, issued November 17, 2009).

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

[4] *James Mack*, 43 ECAB 321 (1991).

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

was not countersigned by Dr. Zinni as appellant's attorney had argued during the November 4, 2009 oral hearing. Section 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[6] As Dr. Panagopoulos did not diagnose a spinal subluxation based on x-ray, he is not a physician under the Act and his reports are of no probative medical value.[7]

A June 29, 2009 report dictated by Dr. Panagopoulos and countersigned by Dr. Zinni stated that appellant was doing better but continued to have regular pain which was exacerbated by her activities and the repetitive nature of her job. They diagnosed left rotator cuff tendinitis and prescribed active therapy with no work restrictions. Appellant also submitted a number of requests for authorization from Dr. Zinni requesting physical therapy, an MRI scan of the neck and upper left extremity, and treatment for her shoulder and cervical spine.

The Board finds that Dr. Zinni's opinion is not well rationalized because it did not detail appellant's prior medical history or treatment. Further, Dr. Zinni failed to identify or specifically address any clinical findings or test results covering the left shoulder. He did not determine that appellant's condition was work related and did not offer a rationalized opinion on the causal relationship between her diagnosed condition and the factors of employment implicated in the claim.[8] While Dr. Zinni generally stated that her repetitive job activities were exacerbating her pain, he never stated that the January 31, 2009 employment incident caused or contributed to the shoulder injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[9] The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[10] Therefore, Dr. Zinni's medical reports are insufficient to meet appellant's burden of proof.

The remaining medical evidence of record does not establish a causal relationship between appellant's shoulder injury and the January 31, 2009 employment incident. Diagnostic testing was obtained by Dr. Cohen and the May 12, 2009 MRI scan of the left shoulder showed suspect, minimal, arthritic changes at the AC joint and minimal bursitis. The cervical MRI scan showed degenerative disc desiccation with no focal disc herniation or spinal stenosis. While Dr. Cohen diagnosed appellant's spine and shoulder injury, he did not identify the cause of the problem and did not mention her employment. The Board has held that medical evidence that

[6] 5 U.S.C. § 8101(s); *Sheila A. Johnson*, 46 ECAB 323 (1994).

[7] *See A.O.*, 60 ECAB ___ (Docket No. 08-580, issued January 28, 2009) (without diagnosing a subluxation from x-ray, a chiropractor is not a physician under the Act).

[8] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[9] *C.B.*, 61 ECAB ___ (Docket No. 09-2027, issued May 12, 2010); *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009).

[10] *See Lee R. Haywood*, 48 ECAB 145 (1996).

does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11] Without medical reasoning explaining how the January 31, 2009 employment incident caused the shoulder injury, Dr. Cohen's report is insufficient to meet appellant's burden of proof.[12]

The record does not contain a rationalized medical report explaining how appellant's left shoulder condition resulted from the January 31, 2009 employment incident. Appellant has alleged that her accepted duties as a rural carrier associate caused her left shoulder injury. Her statements, however, do not constitute medical evidence which is necessary to establish causal relationship. Neither the fact that the condition became apparent during a period of employment, nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[13] Therefore, appellant's belief that her condition was caused by the work-related exposure is not determinative.

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relation.[14] An award of compensation may not be based on surmise, conjecture, speculation or on the employee's own belief of causal relation.[15] Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[16] Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[17]

[11] *Supra* note 9.

[12] *C.B.*, 60 ECAB ___ (Docket No. 08-1583, issued December 9, 2008).

[13] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[14] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[15] *D.D.*, 57 ECAB 734 (2006).

[16] *D.K.*, 59 ECAB 141 (2007).

[17] *K.H.*, 59 ECAB 495 (2008).

ANALYSIS -- ISSUE 2

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In the March 1, 2010 reconsideration request, appellant's attorney requested that the record be held open for 30 days to allow them to submit a medical report from Dr. Zinni addressing causal relationship. On March 12, 2010 the Office informed him that it had not yet received this report. To require it to reopen a case for reconsideration, appellant must submit relevant evidence not previously of record or advance legal contentions not previously considered.[18] She failed to submit any medical evidence addressing causal relationship and no such report was received by the Office. Further, appellant's attorney brief recitation requesting reconsideration did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.[19]

Thus, appellant has not established that the Office abused its discretion in its April 5, 2010 decision under section 8128(a) of the Act because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.[20]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a traumatic injury on January 31, 2009 in the performance of duty, as alleged. The Office properly denied her request for reconsideration without a merit review.

[18] *Helen E. Tschantz*, 39 ECAB 1382 (1988); *Ethel D. Curry*, 35 ECAB 737 (1984); *Edward Matthew Diekemper*, 31 ECAB 224 (1979); *E.g., Eladio Joel Abrera*, 28 ECAB 401 (1977).

[19] *Id.*

[20] *Sherry A. Hunt*, 49 ECAB 467 (1998).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated April 5, 2010 and December 29, 2009 are affirmed.

Issued: March 11, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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