

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Boston, MA, Employer**

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**Docket No. 11-771
Issued: November 17, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 8, 2011 appellant filed a timely appeal of the November 1, 2010 decision of the Office of Workers' Compensation Programs (OWCP) which denied his claim for an occupational disease claim. He also appealed a January 14, 2011 decision which denied his request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he developed an occupational disease in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 7, 2010 appellant, then a 34-year-old temporary city mail carrier, filed an occupational disease claim, alleging that he experienced muscle spasms of the left arm, shoulder and upper back as a result of carrying a mailbag. He became aware of his condition and realized it was causally related to his job on September 1, 2010. Appellant stopped work on September 3 and returned on September 16, 2010.²

Appellant submitted a duty status report from Dr. Marcel St. Louis DeMertine, a Board-certified family practitioner, on September 11, 2010, who noted clinical findings of left shoulder pain and noted an “occupational” diagnosis. Dr. DeMertine returned appellant to work light duty. Appellant also submitted a September 17, 2010 duty status report from Dr. Kenneth McLaughlin, a Board-certified emergency room physician, who noted clinical findings of left trapezius muscle sprains and diagnosed left upper back strain and left arm weakness. Dr. McLaughlin returned appellant to work with restrictions. Appellant submitted discharge instructions for a muscle spasm. He also submitted a September 17, 2010 return to work note from a nurse practitioner who noted that appellant could return to work on September 24, 2010.

In a September 28, 2010 letter, OWCP advised appellant of the type of evidence needed to establish his claim. It particularly requested that he submit a physician’s reasoned opinion addressing the relationship of his claimed condition and specific work factors.

In an October 2, 2010 statement, appellant noted that he worked for the employing establishment for over a year and developed muscle pain. After being transferred to the Jamaica Plain station on July 30, 2010, he found the terrain of the mail route rough when carrying a 35-pound mailbag on hilly streets. On September 2 and 3, 2010 appellant woke with severe pain on his left shoulder, arm and back and sought treatment. His physician took him off work from September 3 to 10, 2010. Appellant asserted that his shoulder injury was caused by constantly using his left shoulder and carrying a mailbag and was unrelated to his previous military duties.

Appellant submitted an October 5, 2010 physical therapy prescription from Dr. Rita Wadhvani, a Board-certified family practitioner, in which she related that he was a mail carrier and carried a heavy satchel on his left shoulder and had neck spasm and left arm pain for about five weeks. Dr. Wadhvani diagnosed cervical strain with left arm radiculopathy. In a return to work slip dated October 5, 2010, she noted that appellant could return to work on October 19, 2010 without restrictions. In an October 14, 2010 duty status report, Dr. Wadhvani noted that appellant could return to work with restrictions. In an October 14, 2010 attending physician’s report, she listed a history of pain in the left shoulder and left arm with limited range of motion beginning on September 1, 2010 after appellant carried a heavy satchel. Dr. Wadhvani noted September 17, 2010 x-ray findings of no fracture or dislocation of the right upper extremity. She diagnosed left shoulder strain and limited range of motion. Dr. Wadhvani noted with a checkmark “yes” that appellant’s condition was caused or aggravated by an employment activity. Appellant was totally disabled from September 9 to October 5, 2010 and could return to light

² On September 20, 2010 the employing establishment submitted a letter of controversion noting that appellant submitted his resignation on August 30, 2010 effective September 8, 2010 citing conflicts with his schooling and military obligations. It was noted that on September 7, 2010 appellant rescinded his resignation.

duty on October 5, 2010. In an October 14, 2010 duty status report, Dr. Wadhvani noted clinical findings of left shoulder and arm strain with restricted range of motion. She diagnosed left shoulder strain and returned appellant to work light duty on October 19, 2010. In an October 5, 2010 attending physician's report, Dr. DeMertine noted a history of left shoulder and low back pain beginning on September 1, 2010. He diagnosed left shoulder strain and noted with a checkmark "yes" that appellant's condition was caused or aggravated by work activity. In an October 15, 2010 duty status report, Dr. DeMertine noted findings of left shoulder and arm pain and diagnosed left shoulder and back strain. He returned appellant to work full time with restrictions.

In a November 1, 2010 decision, OWCP denied appellant's claim finding that he did not provide sufficient medical evidence noting specific work duties along with the physician's opinion regarding how such duties caused or aggravated a medical condition.

On November 11, 2010 appellant requested reconsideration. He submitted a copy of OWCP's decision dated November 1, 2010, previously of record. Also submitted was a September 17, 2010 x-ray report of the left shoulder which revealed no evidence of fracture or dislocation. Appellant submitted a September 17, 2010 report from Dr. Kenneth McLaughlin, a Board-certified emergency room physician, who noted that appellant was a postal carrier and presented to the emergency room with complaints of left shoulder, upper and lower back pain radiating into the left arm commencing September 1, 2010. He reported that his injury of the left shoulder, arm and back was work related and sought treatment on September 3 and 7, 2010. Dr. McLaughlin noted findings upon physical examination of slight flattening of the musculature to the left trapezius at C5 to T2 paraspinally, slight pain on palpation of the anterior rotator cuff region and decreased strength on lateral abduction but intact abduction, flexion and extension of the shoulder. He diagnosed left upper back muscle spasm commencing September 1, 2010. Dr. McLaughlin recommended warm moist compresses to the muscle spasm. Appellant submitted an October 5, 2010 x-ray of the cervical spine revealed no abnormalities with no cause identified for pain. Also submitted was a November 9, 2010 duty status report from Dr. Wadhvani, who diagnosed left shoulder strain and returned appellant to work part-time light duty on November 9, 2010.

In a January 14, 2011 decision, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. Appellant must also establish that such event, incident or exposure caused an injury.³

³ See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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) factual statement identifying 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 employment 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 employment factors identified by claimant. The medical evidence required to establish causal relationship is generally 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. 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.⁴

ANALYSIS -- ISSUE 1

It is not disputed that appellant's duties as a letter carrier included lifting and carrying mail bundles and walking. It is also not disputed that he has been diagnosed with left shoulder and back strain and left upper back spasms. However, appellant has not submitted sufficient medical evidence to establish that his diagnosed conditions were causally related to specific employment factors or conditions. He did not submit a rationalized medical report from a physician addressing how specific employment factors may have caused or aggravated his claimed conditions.

In the October 5, 2010 attending physician's report, Dr. DeMertine diagnosed left shoulder strain beginning on September 1, 2010 and noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.⁵ Dr. DeMertine did not explain why particular employment duties caused or aggravated a diagnosed condition. Duty status reports from him dated September 11 and October 15, 2010 did not specifically address whether appellant's injury was work related⁶ nor did he provide a specific and rationalized opinion as to the causal relationship between appellant's employment and his diagnosed left shoulder and back strain.⁷ Therefore, these reports are insufficient to establish appellant's claim.

⁴ *Solomon Polen*, 51 ECAB 341 (2000).

⁵ *D.D.*, 57 ECAB 734 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006).

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

⁷ *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

In her October 14, 2010 attending physician's report, Dr. Wadhvani diagnosed left shoulder strain, noted a period of disability and checked a box "yes" that appellant's condition was caused or aggravated by an employment activity. As noted, a physician's opinion on causal relationship which consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim. In an October 5, 2010 report, Dr. Wadhvani listed diagnoses and noted that appellant was a mail carrier, who carried a heavy satchel on his left shoulder and experienced neck spasm and left arm pain for approximately five weeks. However, she did not specifically address why carrying a satchel on his left shoulder would cause or aggravate any particular medical condition. Dr. Wadhvani did not explain the process by which carrying a mail satchel would cause or aggravate the diagnosed condition.⁸ Other reports from her did not specifically address whether appellant's employment activities caused or aggravated a diagnosed medical condition. Consequently, these reports are insufficient to establish the claim.

Also submitted was the September 17, 2010 duty status report from Dr. McLaughlin, who noted clinical findings of left trapezius muscle sprains and diagnosed left upper back strain and left arm weakness. However, Dr. McLaughlin did not specifically address whether appellant's employment activities had caused or aggravated a diagnosed medical condition. Likewise, other medical reports, including reports of diagnostic testing, are insufficient to establish the claim as they do not specifically address whether particular employment factors caused or contributed to a diagnosed left shoulder and back conditions. Consequently, the medical evidence is insufficient to establish a causal relationship between specific factors or conditions of employment and the diagnosed medical conditions.

Appellant submitted return to work instructions dated September 17, 2010 prepared by a nurse practitioner. However, the Board has held that lay individuals such as nurses are not competent to render a medical opinion under FECA.⁹

On appeal, appellant's asserts that sufficient evidence was submitted to support that the diagnosed left shoulder and back strain and left upper back spasms are work related. As noted above, although his physicians, including Dr. Wadhvani and Dr. DeMertine, provided some support for causal relationship, they did not provide medical rationale explaining the basis of their opinions.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁰ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may

⁸ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

⁹ *David P. Sawchuk*, 57 ECAB 316 (2006).

¹⁰ 5 U.S.C. § 8128(a).

obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by the OWCP;
or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹¹

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹²

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.¹³

ANALYSIS -- ISSUE 2

OWCP’s January 14, 2011 decision, denied appellant’s reconsideration request, without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

With his November 11, 2010 reconsideration request, appellant submitted relevant and pertinent evidence not previously considered by OWCP. After the November 1, 2010 decision, which denied his claim because he had not submitted a rationalized medical opinion establishing that the September 1, 2010 incident caused his left shoulder and low back pain, he submitted a September 17, 2010 report from Dr. McLaughlin, who noted that appellant was a postal carrier who presented to the emergency room with complaints of left shoulder, upper and lower back pain radiating into the left arm commencing on September 1, 2010. Appellant reported to Dr. McLaughlin and he found this was a workers’ compensation injury to his left shoulder, arm and back and sought treatment on September 3 and 7, 2010 and was given a week off work and prescribed Motrin. Dr. McLaughlin noted examination findings of slight flattening of the musculature to the left trapezius at C5 to T2 paraspinally, slight pain on palpation of the anterior rotator cuff region and decreased strength on lateral abduction. He diagnosed left upper back muscle spasm since September 1, 2010.

This particular medical evidence is relevant as it is contemporaneous to the date of injury, September 1, 2010 and Dr. McLaughlin noted findings upon injury and referenced a history of

¹¹ 20 C.F.R. § 10.606(b)(2).

¹² *Id.* at § 10.608(b).

¹³ See *Daniel Deparini*, 44 ECAB 657 (1993).

injury noting that appellant was a mail carrier and presented to the emergency room with a claimed work-related injury to his left shoulder and back. This evidence was not previously considered by OWCP in rendering a decision. While this evidence may be of limited probative value, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁴ The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(3), this new report from Dr. McLaughlin is sufficient to require reopening appellant's case for further review on its merits.

Therefore, OWCP improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for it to reopen his claim for a merit review. Following this and such other development as deemed necessary, OWCP shall issue an appropriate merit decision on the appellant's claim.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his claimed conditions were causally related to his employment. The Board finds that OWCP, in its decision dated January 14, 2011, improperly denied his request for reconsideration of his case on its merits.

¹⁴ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed and the January 14, 2011 decision is set aside and the case is remanded to it for further development in accordance with this decision.

Issued: November 17, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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