

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD J. BIERWIRTH and U.S. POSTAL SERVICE,
POST OFFICE, Whippany, N.J.

*Docket No. 97-1364; Submitted on the Record;
Issued January 15, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an injury to his right shoulder while in the performance of duty.

On November 21, 1995 appellant, then a 53-year-old automation clerk, filed a claim alleging that he had injured his shoulder while in the performance of duty on October 22, 1995.¹ Appellant noted that he did not report this incident to his supervisor although he did report to the first aid station for medication.

In a treatment note dated August 7, 1995, Dr. James H. Reid, appellant's treating physician and Board-certified in orthopedic surgery, stated that he treated appellant for a right shoulder condition. In a treatment note dated November 21, 1995, Dr. Reid stated that appellant alleged that he had injured his shoulder at work several weeks prior to the November 21 examination, and that, upon examination, he had 90 degrees abduction of his right shoulder with pain and weakness and limited internal rotation. He indicated that appellant had right shoulder strain and probable rotator cuff tear.

By letter dated December 19, 1995, the Office of Workers' Compensation Programs requested that appellant submit detailed factual and medical information regarding how the injury occurred, a medical report specifically addressing current and prior treatment for this or related conditions, objective findings and results of tests, a diagnosis, treatment given and a clear opinion on the relationship of the diagnosed condition to specific factors of federal employment.

In a medical report dated November 28, 1995 and received by the Office on January 2, 1996, Dr. Reid stated that appellant was disabled due to rotator cuff injury and strain. In a statement dated November 29, 1995 and received by the Office on January 16, 1996, appellant's

¹ The Board notes that appellant did not date his claim, but that the employing establishment annotated receipt of the claim on November 21, 1995.

supervisor stated that she did not witness appellant's injury, nor did appellant report an injury nor did he ask permission to attend the first aid clinic on October 22, 1995.

On January 29, 1996 the Office denied the claim.

Appellant timely requested reconsideration on February 24, 1996 and submitted additional medical evidence in support of his request. In a medical report dated January 18, 1996 and received by the Office on February 12, 1996, Dr. Reid stated that appellant had right shoulder soreness, positive impingement and decreased abduction. In a February 9, 1996 treatment note, he stated that appellant had full abduction with weakness and a slightly positive impingement sign. Dr. Reid noted that appellant was neurologically intact in the right arm. In a February 20, 1996 medical report, he stated that appellant had bursitis, probable rotator cuff tear, positive impingement sign, abduction to 160 degrees with some pain on extremes and almost normal rotation. In a March 19, 1996 medical report, he stated that he believed that appellant's rotator cuff condition was causally related to his work. Dr. Reid also stated that although appellant had noted a prior shoulder problem, he did not receive medical care for that condition nor was a diagnosis ever rendered. In a treatment note dated the same day, he stated that appellant had full abduction with weakness and mild limitation. In an April 3, 1996 medical report, Dr. Alan G. Kelsey, appellant's family physician, stated that he had treated appellant for 14 years and at no time had he treated appellant for any shoulder condition, noting that appellant's current shoulder condition was causally related to the alleged October 22, 1995 incident. In an April 23, 1996 treatment note, Dr. Kelsey stated that appellant had good internal rotation and satisfactory abduction.

On May 29, 1996 the Office denied appellant's request for reconsideration.

On October 1, 1996 appellant again requested reconsideration.

On December 12, 1996 the Office denied appellant's request for reconsideration on the grounds that the evidence failed to establish that appellant sustained an injury as alleged.

The Board finds that appellant failed to establish that he had sustained injury on October 22, 1995 while in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her 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 of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is 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 upon a traumatic injury or occupational disease.³

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

In order to determine whether an employee actually sustained an 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 which is alleged to have occurred.⁴ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁵ An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁶ A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁷

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.⁸

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.⁹

In this case, the record contains a June 13, 1996 medical report from Dr. Robert F. McEvoy, Board-certified in internal medicine, who stated that appellant initially began complaining of shoulder pain in July 1995 at which time he referred him to Dr. Reid. In an attending physician's report dated January 23, 1996 and received by the Board on August 8, 1996, Dr. Reid stated that appellant had either a concurrent or preexisting calcific bursitis probable rotator cuff tendinopathy. He diagnosed appellant as having a work-related right

⁴ *Elaine Pendleton*, *supra* note 2.

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁷ *Id.* at 255-56.

⁸ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁹ *James Mack*, 43 ECAB 321 (1991).

shoulder strain. In a September 16, 1996 medical report, Dr. Reid stated that appellant sustained a work-related injury on October 22, 1995 which caused rotator cuff tendinitis and bursitis as a post-traumatic situation.

It is appellant's burden to establish that he sustained an injury to his right shoulder on October 22, 1995. However, the record reveals that although appellant alleged that he injured his right shoulder on October 22, 1995 and sought medical care at the first aid clinic, he did not report the incident until almost one month later on November 20, 1995. The Board notes that appellant's supervisor was unable to substantiate any of the events as appellant alleged on October 22, 1995. Further, the record fails to support appellant's statement that he had sought any medical treatment from the time of the alleged incident until November 21, 1995. In addition, the medical evidence of record indicates that appellant had been treated prior to the alleged injury for a shoulder condition by his treating physician, Dr. McEvoy, in July 1995 and that he subsequently referred him to Dr. Reid who also treated appellant for a right shoulder condition on August 7, 1995, almost three months prior to the date that appellant alleged he had injured his shoulder. In view of the inconsistencies in appellant's statements, regarding how, where and when he sustained his injury and the total lack of contemporaneous medical evidence supporting such an injury, the Board finds that there is insufficient evidence to establish that the October 1995 incident occurred as alleged.

Moreover, the medical evidence of record failed to establish that appellant sustained any injury causally related to his employment. Although Dr. Reid stated in multiple medical reports that appellant's condition was attributable to an October 22, 1995 work-related injury, he failed to provide a rationalized medical opinion explaining either the causal relationship between appellant's condition and the alleged October 1995 incident, or an explanation as to why the pre-existing right shoulder condition was not the cause of appellant's condition after October 22, 1995. Indeed, Dr. Reid stated in his March 19, 1996 medical report that appellant had not received medical care for his right shoulder prior to the October 22, 1995 injury. This statement contradicts the doctor's August 7, 1995 treatment note which reflects treatment for a right shoulder condition. Thus appellant has failed to establish an accurate history of his right shoulder condition and thus Dr. Reid's medical reports are of limited probative value. The Office found that Dr. Reid's medical reports failed to explain a mechanism of injury, or to overcome a discrepancy in the medical history which indicated that appellant was under his medical care since July 1995¹⁰ for a shoulder injury, or to provide a rationalized medical opinion establishing a causally related between appellant's condition and the alleged incident. Further, the Office properly found that the reports of Drs. Kelsey and McEvoy did not contain any rationalized medical opinion regarding the cause of appellant's condition and thus are of no probative value. Indeed, Dr. McEvoy's June 13, 1996 report referred to a July 1995 shoulder injury, three months prior to appellant's claimed injury and consistent with Dr. Reid's August 7, 1995 treatment note.

The decisions of the Office of Workers' Compensation Programs dated December 19 and May 29, 1996 are affirmed.

¹⁰ The Board notes that the earliest dated medical record is August 7, 1995 for right shoulder condition.

Dated, Washington, D.C.
January 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member