U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of THEODORE J. BODWELL and U.S. POSTAL SERVICE,
POST OFFICE, Canoga Park, CA

*Docket No. 98-825; Submitted on the Record;*
*Issued January 4, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On July 28, 1997 appellant, then a 43-year-old distribution/window clerk, filed an occupational disease claim alleging that he sustained chronic lumbosacral strain, a torn rotator cuff in the right shoulder, a torn joint cuff in the left shoulder, left hip strain and chronic myositis causally related to factors of his federal employment.

By decision dated October 16, 1997, the Office denied appellant's claim on the grounds that the medical evidence submitted was insufficient to establish fact of injury.

In a letter dated October 29, 1997, appellant requested reconsideration of his claim. By decision dated November 12, 1997, the Office denied merit review of the prior decision on the grounds that the evidence submitted was immaterial and repetitious.

The Board finds that appellant has not established that he sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim, including the fact 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 are causally related to the employment injury.[2]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (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) 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 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.[3] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[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,[5] must be one of reasonable medical certainty,[6] 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.[7] 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. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused by or aggravated by employment conditions is sufficient to establish causal relation.[8]

In the present case, appellant submitted a report dated July 15, 1997 from Dr. Ivan C. Tiholiz, a general practitioner and his attending physician, who indicated the dates of his treatment of appellant in 1996 and 1997, listed findings on examination and diagnosed chronic lumbosacral strain, a torn rotator cuff of the right shoulder and torn joint cuff of the left shoulder, a strain of the left hip and chronic myositis. He opined that "the work environment described to me can place [appellant] in situations where he is chronically aggravating the pectoral girdle and lumbosacral spine." Dr. Tiholiz's opinion that appellant's situation at work could aggravate his condition is couched in speculative terms and, therefore, of diminished probative value.[9] Further, Dr. Tiholiz did not discuss how specific factors of appellant's federal employment

[3] *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[4] The Board has held that in certain cases, where the causal connection is so obvious, expert medical testimony may be dispensed with to establish a claim; *see Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

[5] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[7] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[8] *Manuel Garcia*, 37 ECAB 767, 773 (1986); *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

[9] *William S. Wright*, 45 ECAB 498 (1994).

aggravated a pectoral girdle or lumbosacral spine condition or provide any rationale for his opinion.[10]

Appellant also submitted office visit notes and disability certificates dated November 1993 through May 1997 from Dr. Tiholiz who listed various diagnoses and work restrictions. This evidence, however, is of little probative value on the relevant issue in the present case as Dr. Tiholiz provided no opinion regarding the cause of appellant's medical problems.[11]

In a duty status report dated August 21, 1997, Dr. Tiholiz diagnosed fibromyositis with arthritis, indicated that appellant's "chronic pain and discomfort [are] aggravated by physical exertion," and listed work restrictions. Dr. Tiholiz, however, did not relate the diagnosed condition or any aggravation thereof to specific factors of appellant's federal employment and thus his opinion is insufficient to meet appellant's burden of proof.

As appellant has not submitted rationalized medical evidence to substantiate that he sustained an occupational disease due to factors of his federal employment, the Office properly denied his claim.

The Board further finds that the Office abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[12]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[13] Evidence

[10] *Carolyn F. Allen*, 47 ECAB 240 (1995) (Medical reports not containing rationale on causal relationship are entitled to little probative value.)

[11] *See Charles H. Tomaszewski*, 39 ECAB 461 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[12] 20 C.F.R. § 10.138(b)(1).

[13] *See* 20 C.F.R. § 10.138(b)(2).

that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[14] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[15]

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.[16] The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[17] If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[18]

In support of his request for reconsideration, appellant resubmitted Dr. Tiholiz's July 15, 1997 report. However, as this evidence was previously considered by the Office it is repetitive in nature and thus insufficient to warrant a merit review of the case.[19]

Appellant also submitted a statement, received by the Office on October 29, 1997, wherein he described the factors of employment to which he attributed his condition. However, appellant's statement is not relevant to the issue at hand, which is whether the medical evidence establishes that he has a condition causally related to factors of his federal employment.

Appellant further submitted a report dated October 15, 1997 from Dr. Tiholiz. In this report, Dr. Tiholiz noted that he treated appellant for problems with his lumbosacral spine and shoulders. He related:

> "[Appellant] stated that these occurred in his work environment. [His] work necessitated repeated stooping, bending and twisting of his torso. Additionally, he was required to make excessive use of his pectoral girdle, with the result being aggravation of his bilateral shoulder problems."

Dr. Tiholiz concluded that appellant "chronically aggravated the conditions in his work environment."

The record does not contain a prior report from Dr. Tiholiz discussing the particular factors of appellant's federal employment to which he attributed his condition or a specific finding that his employment aggravated his condition. As this report was not previously of record and is relevant to the issue of whether appellant sustained an employment-related

[14] *Daniel Deparini*, 44 ECAB 657 (1993).

[15] *Id.*

[16] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[17] *See* 20 C.F.R. § 10.138(b).

[18] *Dennis J. Lasanen*, 41 ECAB 933 (1990).

[19] *Eugene F. Butler*, 36 ECAB 393 (1984).

occupational disease, it is sufficient to require the Office to conduct a merit review of the case. Therefore, the case shall be remanded to the Office to review the entire case record. After such further development as is deemed necessary, the Office shall issue a *de novo* decision on the merits of the case.

The decision of the Office of Workers' Compensation Programs dated November 12, 1997 is set aside and the case is remanded for further proceedings consistent with this decision of the Board. The decision dated October 16, 1997 is affirmed.

Dated, Washington, D.C.
January 4, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member