

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

ROBBIE A. BROWN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Savannah, GA, Employer**

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**Docket No. 04-487
Issued: June 1, 2004**

Appearances:
Robbie A. Brown, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 6, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 17, 2003 denying her request for a review of the written record on the grounds that it was untimely filed, a September 5, 2003 decision denying her claim for calcific tendinitis of the left shoulder and a November 10, 2003 decision denying her claim for a review of the written record on the grounds that it was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denials of review of the written record and left shoulder tendinitis causation issues in this case. The Board does not have jurisdiction over an October 23, 2002 decision of the Office denying appellant's claim for calcific tendinitis of the right shoulder, as the decision was issued more than one year prior to December 6, 2003, the date appellant filed her appeal with the Board.¹

ISSUES

The issues on appeal are: (1) whether appellant has established that she sustained calcific tendinitis of the left shoulder causally related to work factors; and (2) whether the Office

¹ 20 C.F.R. §§ 501.2(c) and 501.3.

properly denied appellant's requests for a review of the written record and an oral hearing pursuant to 5 U.S.C. § 8124(b). On appeal, appellant asserted that the employing establishment and Office were racist and conspired to deny her claims.

FACTUAL HISTORY

On July 16, 2002 appellant, then a 52-year-old modified automated markup clerk, filed a claim for calcific tendinitis of the right shoulder and "frozen shoulder."² She attributed her condition to repetitive upper extremity motion while photocopying, sorting and processing magazines and flats of mail. The employing establishment controverted the claim as appellant was on leave when her shoulder locked on May 12, 2002.

In support of her claim, appellant submitted a May 12, 2002 report by Dr. William Stamant, an emergency room physician, diagnosing right shoulder bursitis with calcifications and noting "overuse at work." In a May 13, 2002 report, Dr. Gene S. Kennedy, an attending family practitioner, diagnosed right shoulder tenosynovitis and bilateral calcific tendinitis of the shoulders, which he characterized as a "repetitive motion injury."

By decision dated October 23, 2002, the Office denied appellant's claim for right shoulder tendinitis on the grounds that causal relationship was not established. In a letter dated March 5, 2003 and received by the Office on or before March 17, 2003, appellant requested a review of the written record and enclosed a job description. The envelope in which appellant mailed the March 5, 2003 letter is not of record. By decision dated April 17, 2003, the Office denied appellant's March 5, 2003 request for a review of the written record on the grounds that it was untimely filed more than 30 days after issuance of the October 23, 2002 decision. The Office also denied the claim as the issue could be addressed equally well by submitting new, relevant evidence supporting causal relationship accompanying a valid request for reconsideration.

On June 30, 2003 appellant filed a claim for calcific tendinitis of the left shoulder, which she attributed to repetitive upper extremity motion at work, including photocopying, sorting mail and throwing magazines. Appellant's supervisor generally corroborated appellant's description of repetitive work tasks and noted that appellant worked overtime "almost every week." However, she controverted the claim as appellant's claim for right shoulder tendinitis had been denied.³

In support of her claim, appellant submitted chart notes dated June 18, 2002 and March 11 to May 22, 2003, from Dr. John P. George, an attending Board-certified orthopedic surgeon, who diagnosed left shoulder impingement syndrome with glenohumeral arthritis by x-ray. He noted on April 1, 2003 that appellant worked at the post office with repetitive upper

² The record indicates that appellant accepted a limited-duty job offer on November 23, 2001 as she could no longer perform the keying requirements of her position due to bilateral carpal tunnel syndrome.

³ In a July 15, 2003 letter, the Office advised appellant of the need to submit rationalized medical evidence from her treating physician supporting causal relationship.

extremity tasks and that “reaching and doing the copying of the mail at work” caused left shoulder discomfort.

By decision dated September 5, 2003, the Office denied appellant’s claim on the grounds that causal relationship was not established due to a lack of rationalized medical evidence. In an October 7, 2003 letter, postmarked October 8, 2003, appellant requested a review of the written record by a representative of the Office’s Branch of Hearings and Review. By decision dated November 10, 2003, the Office denied appellant’s request for a review of the written record on the grounds that it was not timely filed within 30 days of the September 5, 2003 decision.⁴ The Office additionally denied the request on the grounds that the issues in the case could be addressed equally well through a valid request for reconsideration and submitting new, relevant evidence establishing that she sustained an injury as alleged.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act⁵ 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; that an injury was sustained while 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.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

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 the 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

⁴ The November 10, 2003 decision incorrectly refers to appellant’s October 8, 2003 request as a request for an oral hearing. However, under the circumstances of this case, this mischaracterization is harmless, nondispositive error as the 30-day time limitation under 5 U.S.C. § 8124(b) applies equally to a request for an oral hearing or a review of the written record.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

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.⁸

ANALYSIS -- ISSUE 1

Appellant alleged that she developed calcific tendinitis of the left shoulder as a result of performing her markup clerk duties of photocopying and sorting mail. The Office denied appellant's claim for compensation on the grounds that the medical evidence was not sufficient to establish that the diagnosed condition was causally related to her employment.

The Board notes, however, that the evidence generally supports that appellant developed calcific tendinitis of the left shoulder as a result of repetitive motion in the performance of her mail clerk duties. Appellant's supervisor confirmed that appellant's assigned duties required repetitive motion of the upper extremities in photocopying, sorting and processing mail. Dr. Kennedy, an attending family practitioner, opined in a May 13, 2002 report, that calcific tendinitis of appellant's shoulders bilaterally was a "repetitive motion injury." Dr. George, an attending Board-certified orthopedic surgeon, noted on April 1, 2003 that repetitive upper extremity maneuvers at work including "reaching and doing the copying of the mail" caused left shoulder discomfort. He diagnosed left shoulder impingement syndrome with glenohumeral arthritis.

Although these physician's opinions are not sufficiently rationalized⁹ to meet appellant's burden of proof in establishing her claim, they stand uncontroverted in the record and are, therefore, sufficient to require further development of the case by the Office.¹⁰ However, the Office did not undertake further development of the medical record, such as referring appellant for a second opinion examination. In view of the above evidence, the Board finds that the Office should have referred the matter to an appropriate medical specialist to determine whether appellant's employment duties caused or aggravated calcific tendinitis or other conditions of the left shoulder.

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹¹ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner. Therefore, the Board finds that the case must be remanded to the Office for preparation of a statement of accepted facts concerning appellant's working conditions and referral of the matter to an appropriate medical specialist,

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

⁹ *See Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹⁰ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 280 (1978).

¹¹ *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Marco A. Padilla*, 51 ECAB 202 (1999); *John W. Butler*, 39 ECAB 852 (1988).

consistent with Office procedures, to determine whether appellant may have developed calcific tendinitis of the left shoulder as a result of performing her employment duties. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

As the case must be remanded for further development on the issue of causal relationship of appellant's work factors to the claimed left shoulder condition, the issue of whether the Office properly denied her October 8, 2003 request for a review of the written record is moot.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... 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."¹² Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹³ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁴

ANALYSIS -- ISSUE 2

In the present case, pursuant to the Office's October 23, 2002 denial of her claim for right shoulder tendinitis, appellant requested a review of the written record in a letter dated March 5, 2003. Section 10.616 of the federal regulation provides that a request for a review of the written record or an oral hearing "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."¹⁵ The envelope which contained appellant's request for a review of the written record is not of record. However, appellant's letter was not signed and dated until March 5, 2003, significantly more than 30 days after issuance of the October 23, 2002 decision. Thus, it is clear that appellant's request for a review of the written record was not timely filed.

As appellant did not request a hearing within 30 days of the October 23, 2002 decision, she is not entitled to a hearing as a matter of right. The Office must then exercise its discretion to determine whether appellant's request for a review of the written record should be granted. In its April 17, 2003 decision, the Office considered the issue involved and found that appellant could pursue it equally well through submitting new, relevant evidence on reconsideration.

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. §§ 10.616, 10.617.

¹⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹⁵ 20 C.F.R. § 10.616(a).

Therefore, the Office properly exercised its discretion in denying appellant's request for a review of the written record.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding the claimed left shoulder condition and the case is remanded to the Office for further development. The Board further finds that the Office properly denied appellant's March 5, 2003 request for a review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 10 and September 5, 2003 are set aside and the case remanded to the Office for further proceedings consistent with this opinion. The decision of the Office dated April 17, 2003 is affirmed.

Issued: June 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member