United States Department of Labor
Employees' Compensation Appeals Board

THANH VO, Appellant	)	
and	)	**Docket No. 04-173**
	)	**Issued: May 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
James L. Clack, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 22, 2003 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs' dated May 9, 2003, which denied his claim of injury on February 22 and July 22, 2003, which denied his request for reconsideration. The Board has jurisdiction over the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether appellant sustained an injury on February 22, 2003 while in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 22, 2003 appellant filed a claim alleging that he sustained an injury that day while in the performance of duty. He alleged that he injured his left shoulder, arm and elbow while pushing a mail hamper. Appellant left work that day and received continuation of pay until April 3, 2003. In a narrative dated February 22, 2003, appellant stated that he was pushing

mail hampers when he heard a pop in his left elbow, followed by swelling and a numbing sensation in his arm.

Appellant submitted a February 22, 2003 report, in which a physician checked a box "yes" indicating that appellant's left shoulder, arm and elbow injuries were caused by a work-related incident that day. In a February 24, 2003 report, Dr. John T. Mai, a chiropractor, also checked "yes" indicating that appellant's lateral epicondylitis was caused by the February 22, 2003 work-related incident. He placed appellant off work for a week.

By letter dated March 26, 2003, the Office advised appellant that the information he had submitted was insufficient to establish his claim. The Office requested that he submit a physician's opinion with a diagnosis and a rationalized opinion to explain why the diagnosed condition was caused or aggravated by his claimed injury. Appellant was asked whether he had any similar disability or symptoms prior to the February 22, 2003 incident. Appellant submitted a February 24, 2003 report from Dr. Mai, who noted that appellant had a C6-7 fusion on March 23, 2000.[1] The record also reveals that appellant attended physical therapy on February 10, 2003 prior to his injury for lateral epicondylitis.

On April 9, 2003 appellant stated that he had no similar disability or symptoms prior to the February 22, 2003 work-related incident. In a report dated April 17, 2003, Dr. Mai stated that appellant had work related left elbow epicondylitis and myofascitis. In a report dated April 17, 2003, Dr. Jackie Stephenson, a Board-certified urologist, examined appellant and advised that his left elbow epicondylitis and myofascitis were causally related to the February 22, 2003 work-related injury. She explained that she injected him with a steroidal medication along the tendon sheath of the left elbow to facilitate full range of motion.[2] The physician noted that appellant had neck surgery in March 2002. In a report dated May 2, 2003, Dr. Mai released appellant to return to restricted duty effective that day. He again diagnosed lateral epicondylitis.

By decision dated May 9, 2003, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that his medical condition was causally related to the February 22, 2003 work-related incident.

On July 2, 2003 appellant requested reconsideration and submitted a May 27, 2003 report from Dr. Mai and a June 5, 2003 report from Dr. Stephenson. Dr. Mai stated that appellant had a similar injury on February 10, 2003 but that he believed that appellant's injury was the result of trauma on February 22, 2003. In a report dated June 5, 2003, Dr. Stephenson stated that appellant's February 22, 2003 injury "is obviously an exacerbation of the [February 10, 2003] injury, which was treated initially on February 11, 2003…."

[1] The record includes unsigned therapy notes from February 24 to April 14, 2003 and work status reports for the state of Texas from Dr. Mai dated February 24, March 21 and April 18, 2003, in which he advised that appellant was off work based on his left elbow lateral epicondylitis.

[2] Dr. Stephenson did not indicate the specific date that she provided appellant with injections.

By decision dated July 22, 2003, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally in the form of medical evidence, to establish that the employment incident caused the personal injury. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition relate to the employment incident.[3]

ANALYSIS -- ISSUE 1

The Office accepted that the February 22, 2003 incident occurred as alleged, but found that the medical evidence of record was insufficient to establish a causal relationship between a diagnosed condition and the incident.

Under section 8101(2) of the Federal Employees' Compensation Act, "[t]he 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 of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary."[4] In order for Dr. Mai, to be considered a physician under the Act treatment must consist of manipulation of the spine based on a subluxation of the spine as demonstrated by x-ray to exist. He did not diagnose a subluxation of the spine as demonstrated by x-ray to exist. Accordingly, the Board finds that Dr. Mai is not a "physician" as defined under the Act and his reports are of no probative medical value in establishing appellant's claim.[5]

Appellant also submitted a February 22, 2003 report, in which a physician checked a box "yes" indicating that appellant was disabled as a result of shoulder, arm and elbow injuries sustained on that day at work. However, when a physician's opinion supporting causal relationship consists only of checking "yes" to a form question, that opinion has little probative value and is insufficient to establish a causal relationship.[6]

[3] *Gary J. Watling*, 52 ECAB 278 (2000).

[4] 5 U.S.C. § 8101(2); *Carmen Gould*, 50 ECAB 504 (1999).

[5] The Board notes that the Office's March 26, 2003 development letter sent after receipt of Dr. Mai's report did not indicate how a chiropractor's report would be considered medical evidence.

[6] *Gary J. Watling*, *supra* note 3.

Dr. Stephenson's April 17, 2003 report advised that appellant's left elbow epicondylitis and myofascitis were caused by the February 22, 2003 incident when he was moving mail at the employing establishment. She noted appellant's pain as 5 to 6 on a scale of 10 and that it was constant. On examination she noted tenderness of the lateral epicondyle and aggravated, increased pain with active flexion and extension against mild resistance and lifting movement. However, Dr. Stephenson did not fully address how appellant's pushing a mail hamper caused the diagnosed conditions. Her conclusion on causal relationship is speculative in that it does not clearly explain how the physical act of moving or pushing a mail hamper caused a left elbow injury. Moreover, Dr. Stephenson is not a specialist in the relevant field and did not provide a full history of appellant's medical condition.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[7] Section 10.608(b) provides that when an application for review of the merits of a claim 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.[8] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[9]

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant submitted a May 27, 2003 report, from Dr. Mai who opined that appellant's injury was the result of trauma sustained on February 22, 2003. As noted, however, Dr. Mai is not considered to be a "physician" under the fact of this case. In a June 5, 2003 report, Dr. Stephenson stated that appellant's February 22, 2003 injury was an exacerbation of a February 10, 2003 injury. This report is duplicative of the physician's April 17, 2003 report, were in she stated that appellant's conditions were causally related to a February 22, 2003 work-related injury. Therefore, appellant's July 2, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

[7] 20 C.F.R. § 10.606(b)(2) (2003).

[8] 20 C.F.R. § 10.608(b) (2003).

[9] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any additional evidence with his request for reconsideration. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof that he sustained an injury on February 22, 2003. The Board further finds that the Office properly refused to reopen appellant's claim for a review on the merits.

ORDER

IT IS HEREBY ORDERED THAT the July 22 and May 9, 2003 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: May 13, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member