

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

STANA MILAS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Salt Lake City, UT, Employer**

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**Docket No. 05-1648
Issued: December 9, 2005**

Appearances:
David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On July 29, 2005 appellant filed a timely appeal from the April 27, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which denied her April 15, 2005 request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial of a merit review. The Board also has jurisdiction to review the Office's December 8, 2004 merit decision denying appellant's claim of a bilateral shoulder injury.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty in April and early May 2000 while working in a modified position; and (2) whether the Office properly denied her April 15, 2005 request for reconsideration.

FACTUAL HISTORY

On November 26, 2001 appellant, then a 42-year-old former casual employee, filed a claim for compensation alleging that her neck, shoulder and arm pain was the result of her federal employment in 2000:

“In the light[-]duty job, I was sorting letters into boxes. This involved reaching above my head and reaching out in front of my body on a repetitive basis. I would sort letters for three hours out of a four[-]hour shift. The only one hour I did patch up and this did not cause problems with my neck and shoulders. The reaching also involved twisting.”

Appellant indicated that she first became aware of her condition on April 6, 2000. She submitted treatment notes for a nonspecific pain syndrome. A January 19, 2000 report indicated that she was about five months post bilateral L4-5 hemilaminectomies and microdiscectomy. A May 1, 2000 report noted that she was working for the employing establishment four hours a day and had increased back and leg pain at the end of the day. A May 8, 2000 report noted that appellant had a severe aggravation of neck pain, which she claimed was related to her job. A May 19, 2000 note stated that a magnetic resonance imaging (MRI) scan of the cervical spine was unremarkable, with some mild degenerative disease at C5-6 but no obvious reason for her severe neck pain. It was thought her neck pain was musculoskeletal.

On June 27, 2000 Dr. Alan B. Brown, appellant’s orthopedic surgeon, reported that her problems began around November 1998, when she had to do a lot of heavy lifting at work.¹ She ultimately had surgery and got a little better, he reported, but she continued with pain in the right leg and low back. In April 2000, she was working light duty and started having pain mostly in her shoulders and some in her neck. This was constant and worse with sitting, standing and bending forward and backward. Dr. Brown diagnosed bilateral subacromial bursitis. A June 12, 2001 report diagnosed, among other things, chronic cervicgia or neck pain, cervical degenerative disc disease and possible cervical radicular syndrome without any focal neurological deficit.

The record shows that appellant began a casual (modified position) assignment on February 12, 2000, the duties of which included manual letter sorting. The assignment was limited to four hours a day. Appellant was to alternate sitting and standing. She was to avoid bending, reaching and twisting, and was limited to intermittent lifting of 10 to 15 pounds.

On January 16, 2002 the Office asked appellant to submit, within 30 days, a narrative medical report providing, among other things, a current diagnosis of her condition and a well-rationalized opinion on how her federal employment had caused, aggravated or contributed to her current medical condition.

Appellant submitted a February 13, 2002 report from Dr. Steven Jay Anderson, a Board-certified internist specializing in rheumatology. Dr. Anderson stated that he had followed

¹ Appellant sustained an injury in the performance of duty on November 1, 1998. The Office accepted her claim for a herniated disc at L4-5 and approved surgery. OWCP File No. 12-0181290.

appellant since December 2000 for a back injury in 1998. He noted that she continued to have back pain despite surgery in August 1999. It proved to be resistant to treatment and developed into chronic postsurgical pain. Dr. Anderson noted that, after her poor response to surgery, there was “generalization of the chronic pain to involve the neck, shoulder, etc.” His prognosis was that this would continue without much change for the rest of her life.

In a decision dated December 8, 2004, the Office denied appellant’s claim for compensation on the grounds that the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related events. The Office made clear that appellant’s physician “must explain how the event(s) caused or affected your condition, based upon an accurate factual and medical history, citing objective findings in support of the physician’s opinion.”

On April 15, 2005 appellant requested reconsideration. She submitted a diagnostic report showing calcific tendinitis in the left shoulder, muscle spasm and anterior calcification at C5-6, suggesting prior ligamentous injury. Other studies showed a small subacromial spur and down sloping acromion and mild C5-6 degenerative disc disease. On April 11, 2005 Dr. Anderson stated the following:

“In addressing the matter of whether or not the neck pain and the shoulder pain were recurrences of a past injury is impossible for me to determine on objective evidence. The patient gives a history of the past injury and states the second injury felt much the same. I believe the patient is honest in this claim, but I am unable to determine its truthfulness on the basis of the [x]-ray and MRI studies. Currently I would say she is suffering from postinjury pain, post back surgery pain, calcific tendonitis pain, and shoulder impingement pain.”

Dr. Anderson sought a consultation from Dr. David J. Howe, a Board-certified orthopedic surgeon. On February 23, 2005 Dr. Howe related appellant’s history, symptoms and recent diagnostic findings. He described his findings on physical examination and diagnosed pain, both shoulders; calcific bursitis, left shoulder; mild impingement, right shoulder; and degenerated disc, C5-6. He prescribed medication and physical therapy.

The Office received a number of physical therapy records, laboratory records and progress notes. A January 10, 2001 note from Dr. Anderson stated that appellant was having postsurgical back pain related to her back problems and back surgery. He completed a form report on November 15, 2001 -- previously submitted to the Office -- indicating that appellant’s postsurgical chronic spinal pain, which had become more generalized with time, was caused or aggravated by her November 1, 1998 employment injury. The Office also received a couple of reports from the University of Utah Pain Management Center noting her evaluation for low back and leg pain, as well as for neck and shoulder pain and a mood disturbance.

In a decision dated April 27, 2005, the Office denied appellant’s request for reconsideration. The Office determined that the evidence submitted in support of her request was not pertinent or relevant or was duplicative of evidence already of record, and therefore constituted no basis for reopening her claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of proof to establish the essential elements of her claim. When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.³

Causal relationship is a medical issue,⁴ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. 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 established incident or factor of employment.⁷

ANALYSIS -- ISSUE 1

The record establishes that appellant began a casual (modified position) assignment on February 12, 2000 that required her to sort letters manually. Although the job description indicated that she was to avoid reaching and twisting, appellant stated that sorting letters into boxes required her to reach above her head and to reach out and in front of her body on a repetitive basis. The reaching, she stated, also involved twisting. She stated that she did this physical activity for three hours during her four-hour shift. An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁸ There is no strong or persuasive evidence in this case to refute appellant's account of her physical activities at work. The Board therefore finds that she has met her burden of proof to establish that she experienced a specific event,

² 5 U.S.C. §§ 8101-8193.

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).

⁴ *Mary J. Briggs*, 37 ECAB 578 (1986).

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

⁶ See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

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

⁸ *Caroline Thomas*, 51 ECAB 451 (2000).

incident or exposure occurring at the time, place and in the manner alleged.⁹ The question for determination is whether manually sorting letters in April and early May 2000 caused an injury.

This is where appellant's claim fails. Causal relationship is a medical issue, one that must be established by a well-reasoned medical opinion explaining how the particular duties appellant performed in April and early May 2000 caused or aggravated or otherwise contributed to a firmly diagnosed neck or shoulder condition. The Office asked appellant to submit a well-rationalized medical opinion on causal relationship, but none of the evidence she submitted was responsive. Dr. Anderson's February 13, 2002 assertion of a generalization of chronic postsurgical (1999) pain "to involve the neck, shoulder, etc." is not supported by medical rationale and, more to the point, does not attribute a neck or shoulder diagnosis to any of the duties appellant performed in April and early May 2000. His November 15, 2001 form report indicates that appellant's postsurgical chronic spinal pain, which had become more generalized with time, was caused or aggravated by her November 1, 1998 employment injury. That is not the issue on this appeal.

Because appellant failed to submit a well-reasoned medical opinion explaining how the specific duties she performed in April and early May 2000 caused or contributed to a firmly diagnosed neck or shoulder condition, the Board finds that she has not met her burden of proof to establish the element of causal relationship. The Board will affirm the Office's December 8, 2004 decision denying her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹⁰ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹¹

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹²

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹³ A timely request for reconsideration may be granted if the

⁹ The Office's December 8, 2004 decision referred to "the established work-related events."

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.605 (1999).

¹² *Id.* § 10.606.

¹³ *Id.* § 10.607(a).

Office determines that the employee has presented evidence or argument that meets at least one of the three standards above. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on April 15, 2005, well within one year of the Office's December 8, 2004 merit decision denying her claim. The request is therefore timely. The question for determination is whether this request meets at least one of the three standards for obtaining a review of the merits of her claim.

The April 15, 2005 request does not show that the Office erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by the Office. Appellant is therefore not entitled to a merit review of her claim under the first two standards. Instead, appellant supported her request with evidence, and she alleged that she had submitted the medical evidence that was required. The Board has carefully looked at this evidence and finds that none of it satisfies the third standard, which requires relevant and pertinent new evidence not previously considered by the Office.

None of the evidence offers a physician's opinion on whether appellant has a diagnosed neck or shoulder condition causally related to the duties she performed in April and early May 2000. The diagnostic reports and studies, the laboratory and physical therapy records, the reports from the University of Utah Pain Management Center, and the treatment notes she submitted are not relevant to this question. Dr. Anderson, her rheumatologist, reported on April 11, 2005 that he believed appellant was honest in reporting a "past injury" and in stating that a "second injury" felt much the same, but he was unable to determine its truthfulness from x-ray and MRI scan studies, and he offered no opinion on whether she had a diagnosed neck or shoulder condition causally related to the specific duties she performed in April and early May 2000. His January 10, 2001 note stated that appellant was having postsurgical back pain related to her back problems and back surgery, which in no way supports her claim of a neck or shoulder injury in April and early May 2000.

Because the evidence appellant submitted to support her April 15, 2005 request for reconsideration does not meet at least one of the three standards for obtaining a merit review of her claim, the Board finds that the Office properly denied her request.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty. The record contains no medical opinion explaining how the specific duties she performed in April and early May 2000 caused or contributed to a firmly diagnosed neck or shoulder condition. The Board also finds that the Office properly

¹⁴ *Id.* § 10.608.

denied appellant's April 15, 2005 request for reconsideration. The request met none of the standards to obtain a merit review of her claim.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2005 and December 8, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board