

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

RUDOLPH B. EVANS, JR., Appellant

and

**U.S. POSTAL SERVICE, LYND MAY POST
OFFICE, Mayfield, OH, Employer**

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**Docket No. 04-2196
Issued: February 4, 2005**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 9, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated July 1, 2004 denying his claim for a bilateral shoulder condition. Appellant also appealed an August 23, 2004 decision which denied his request for reconsideration of the July 1, 2004 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a bilateral shoulder condition in the performance of duty as alleged; and (2) whether 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).

FACTUAL HISTORY

On September 9, 2003 appellant, then a 56-year-old long-life vehicle driver, filed an occupational disease claim (Form CA-2) alleging that he sustained a right shoulder condition

attributable to lifting, pulling, pushing and driving while in the performance of duty. He first became aware of this condition and of its possible relationship to his federal employment on April 11, 2001, the date of an accepted right shoulder injury.¹ In a September 9, 2003 letter, appellant explained that he drove a right-hand drive vehicle with doors that had to be pulled open and pushed shut. He contended that these duties violated previous work restrictions and caused problems with his right arm.² Appellant retired from the employing establishment in October 2003.

In an April 29, 2004 letter, the Office advised appellant of the type of medical and factual evidence needed to establish his claim, including a physician's report addressing how and why specific factors of his federal employment would cause the claimed shoulder condition.

Appellant submitted medical evidence from Dr. Michael W. Keith, an attending Board-certified orthopedic surgeon specializing in hand surgery, who submitted periodic reports dated from December 13, 2000 to June 19, 2002 describing appellant's history of a service-connected gunshot wound to the upper right arm that required resection of the right clavicle to relieve impingement of the brachial plexus. In a May 18, 2001 report, he noted appellant's employment as a "truck driver" and his complaints of right shoulder pain. On examination Dr. Keith observed a lack of abduction and external rotation in the right shoulder, scapular winging due to the absence of the right distal clavicle and possible impingement of the brachial plexus on internal rotation of the right shoulder. He diagnosed bilateral thumb pain and stiffness, right carpal tunnel syndrome and right shoulder pain with symptoms of rotator cuff impingement.³ In a June 19, 2002 chart note, Dr. Keith stated that electrodiagnostic studies confirmed "brachial plexopathy with medial cord involvement" in the right upper extremity. Dr. Keith opined that appellant could not use his right arm at work due to "the numerous abnormalities involving his right upper extremity."

By decision dated July 1, 2004, the Office denied appellant's occupational disease claim on the grounds that the medical evidence submitted was insufficient to establish a causal relationship between the accepted April 11, 2001 right shoulder injury and the claimed right upper extremity conditions.

Appellant requested reconsideration in an undated letter received by the Office on August 2, 2004. He submitted a July 23, 2004 letter from Dr. Keith who explained that appellant's brachial plexus compression was caused or aggravated by "continuing use of his right arm" at work. Dr. Keith explained that, since surgery, appellant was "continuously restricted from using the arm in any movement of the shoulder which allow[ed] hypermobility of the clavicle" to avoid impinging the brachial plexus. Dr. Keith noted that appellant's continuous use of his right arm to open and close doors, carry parcels and perform other assigned tasks violated

¹ Claim No. 090282729. This claim is not before the Board on the present appeal.

² In his claim form, appellant mentioned left shoulder discomfort but did not specifically allege that he sustained a left shoulder condition. He did not mention his left shoulder in subsequent correspondence with the Office.

³ On October 26, 2001 appellant was found fit for surgery to replace a portion of his right clavicle.

his limitation of only occasional pulling and pushing with the right arm. Appellant also submitted an August 1, 2001 rehabilitation job offer noting his driving duties and an August 9, 2001 personnel slip advising of his transfer to the Lynd May station to begin the position. Additionally, he submitted copies of his September 9, 2003 letter and Dr. Keith's chart notes, all previously of record.

By decision dated August 23, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant as it did not address the critical issue of causal relationship.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act⁴ 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.⁵ 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.⁶

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 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.⁷

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *Solomon Polen*, 51 ECAB 341 (2000).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right shoulder injury on April 11, 2001. Appellant filed an occupational disease claim on September 9, 2003 alleging that work factors also caused a right shoulder condition. Dr. Keith, an attending Board-certified orthopedic surgeon, submitted several reports discussing several conditions affecting appellant's right upper extremity, including carpal tunnel syndrome, brachial plexus impingement and a possible right rotator cuff tear. However, Dr. Keith did not explain how and why factors of appellant's federal employment, in particular his duties as a driver, would cause or aggravate any of the diagnosed conditions. Without such rationale, Dr. Keith's opinion is insufficient to meet appellant's burden of proof in establishing causal relationship.⁸ The Board notes that appellant was advised by April 29, 2004 letter of the necessity of furnishing a rationalized report from his physician.

The Office properly denied appellant's claim for an occupational disease as the medical evidence submitted was insufficient to establish causal relationship.

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.⁹ 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.¹⁰

In support of his request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.¹¹ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.¹² 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.¹³

⁸ *Steven S. Saleh*, 55 ECAB ____ (Docket No. 03-2232, issued December 12, 2003).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ 20 C.F.R. § 10.608(b) (2003).

¹¹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹² *See* 20 C.F.R. § 10.606(b)(3); *see also Mark H. Dever*, 53 ECAB ____ (Docket No. 01-1453, issued July 29, 2002).

¹³ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

ANALYSIS -- ISSUE 2

The Office denied appellant's occupational disease claim by a July 1, 2004 decision, finding that he submitted insufficient rationalized medical evidence to establish a causal relationship between an accepted April 11, 2001 right shoulder injury and the claimed right brachial plexopathy. Appellant submitted the July 23, 2004 letter of Dr. Keith, who addressed that appellant's use of his right arm to open and close doors, carry parcels and perform other assigned activities were in violation of his work restrictions and had caused brachial plexus compression. Appellant also submitted copies of an August 1, 2001 job offer and an August 9, 2001 personnel slip regarding his transfer to the Lynd May station. Additionally, he submitted copies of Dr. Keith's chart notes and his September 9, 2003 letter which had been previously considered by the Office.

Regarding the light-duty job offer and personnel slip, the Board finds that these are administrative documents not relevant to the critical issue of causal relationship in the case. As they are irrelevant, they do not constitute a basis for reopening the case.¹⁴ Also, as Dr. Keith's chart notes and appellant's letter were previously of record, they constitute repetitive, duplicative evidence which is not a basis for reopening the case.¹⁵

The Board finds, however, that Dr. Keith's July 23, 2004 letter constitutes new, relevant and pertinent new evidence not previously considered by the Office. Dr. Keith provided medical rationale explaining how and why specific work factors caused the claimed right shoulder condition. As this report is new and addresses the critical issue in the case, it is sufficient to require a merit review under section 10.606(b)(2). Thus, the Office's denial of appellant's request for review of the merits of his claim constituted an abuse of discretion. Consequently, the case will be remanded for the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

CONCLUSION

The Board finds that appellant properly denied appellant's occupational disease claim as he submitted insufficient medical evidence to meet his burden of proof in establishing a causal relationship between the claimed shoulder condition and work factors. The Board further finds that the Office improperly denied merit review of appellant's request for reconsideration under section 8128(a) of the Act, as he submitted relevant and pertinent new evidence addressing the critical issue of causal relationship. The case is remanded to the Office for a merit review of this evidence, appropriate development and the issuance of a merit decision.

¹⁴ *Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁵ *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this opinion. The July 1, 2004 decision of the Office is affirmed.

Issued: February 4, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member