

FACTUAL HISTORY

On November 20, 2003 appellant, then a 63-year-old accounting technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury while lifting and stacking a computer monitor. Appellant indicated that he had severe pain in his right arm and slight pain in his left arm and back. In a report dated January 19, 2004, an attending orthopedic surgeon, Dr. Craig Zeman diagnosed right shoulder rotator cuff tear, right shoulder acromioclavicular (AC) joint arthritis and impingement. He noted in his history that appellant strained both his right and left shoulders in the November 14, 2003 employment incident, but the left shoulder improved while the right shoulder did not improve.

On February 19, 2004 the Office accepted the claim for a right shoulder bursitis. Appellant underwent right shoulder surgery on March 29, 2004; he returned to work on June 7, 2004.

With respect to a lumbar condition, Dr. Cary Alberstone, a neurosurgeon, provided a history of a November 14, 2003 employment incident and diagnosed spinal stenosis with associated L4-5 disc herniation. Appellant underwent lumbar surgery on August 16, 2004. In a report dated September 13, 2004, Dr. William Boeck, Jr., an orthopedic surgeon selected as a second opinion physician, opined that the back condition was causally related to the November 14, 2003 employment injury. The Office accepted the claim for an L4-5 herniated disc.

On August 31, 2004 appellant filed a claim for compensation (Form CA-7). The accompanying time analysis (Form CA-7a) indicated that appellant used two hours of leave without pay on August 5 and 11, 2004. In a letter dated September 13, 2004, the Office stated that the employing establishment had advised that appellant was seen for medical treatment and requested that he submit supporting evidence.

In a report dated October 19, 2004, Dr. Alberstone reported that appellant stated “about a month ago he was in the shower bending his left leg when he noted a sudden pop in his lower back.” He indicated that appellant had radiating right leg pain. In an October 27, 2004 report, Dr. Alberstone reported that magnetic resonance imaging (MRI) showed a recurrent disc herniation at L4-5. He indicated that he would undergo a second back surgery for this disc herniation.

By decision dated November 5, 2004, the Office denied appellant’s claim for compensation for August 5 and 11, 2004. The Office found that the medical evidence was insufficient to establish that time lost was due to an employment-related condition.

In a report dated January 18, 2005, Dr. Alberstone stated that appellant was just short of three months post microdiscectomy for the second disc herniation. He further stated, “this recurrent disc herniation would not have occurred were it not for the initial disc herniation, which is work related and has been accepted as such.”

Appellant submitted medical reports regarding his shoulder. With respect to a left shoulder condition, appellant submitted a letter dated October 18, 2004 indicating that he had left

shoulder pain. In a report dated February 22, 2005, Dr. Zeman provided a history that appellant's left shoulder was injured at the time of the initial injury and appellant had increasing left shoulder pain. He diagnosed left shoulder impingement, left shoulder AC joint arthritis and possible left shoulder rotator cuff tear. Dr. Zeman stated that he did not understand what the debate was, that he had previously issued a report stating that the left shoulder was related to the original injury. He further stated, "I view a work[ers'] comp[ensation] injury, even with the new apportionment issued, if you hurt your shoulder at work, you hurt your shoulder at work. There may be changes in apportionment, however, apportionment does not indicate no treatment." Dr. Zeman opined that the left shoulder condition was work related, and "just because it was not symptomatic to warrant further treatment at that time, does not diminish the fact this was a work-related injury."

In a decision dated March 28, 2005, the Office determined that appellant had not established a left shoulder condition or a second disc herniation as employment related. Appellant requested an oral hearing before an Office hearing representative in a letter dated June 17, 2005. By decision dated July 26, 2005, the Office determined that the request for a hearing was untimely. The Office further denied the request on the grounds that the issue could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.² In order to establish causal relationship, a physician's opinion must be based on a complete factual and medical background, 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 federal employment.³

ANALYSIS -- ISSUE 1

The medical evidence of record contains a number of medical reports regarding appellant's treatment for a right shoulder condition, and the Office accepted a right shoulder bursitis. Appellant seeks to expand his claim to include a left shoulder condition. Dr. Zeman reported in his initial history that appellant had strained both shoulders on November 14, 2003, but that the left shoulder had improved and his continuing medical reports discuss the right shoulder. He did not provide additional detail in his reports regarding the left shoulder. Although Dr. Zeman stated in his February 22, 2005 report that he did not understand the debate regarding causal relationship of the left shoulder, under the circumstances of this case there is clearly an issue regarding causal relationship of a left shoulder condition and the November 14, 2003 employment injury.

¹ 5 U.S.C. §§ 8101-8193.

² *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Gary L. Fowler*, 45 ECAB 365 (1994).

To meet appellant's burden of proof, the medical evidence must include a reasoned medical opinion that discusses the employment incident, the left shoulder injury sustained, the progression of that injury and an explanation of how the diagnosed conditions of left shoulder impingement, AC joint arthritis and possible rotator cuff tear, are causally related to the November 14, 2003 employment incident. Dr. Zeman did not provide a medical report with sufficient medical reasoning to meet appellant's burden of proof. He stated in a February 22, 2005 report that just because the left shoulder condition was not initially symptomatic did not preclude causal relationship with the original injury, but he did not clearly explain how left the shoulder condition was caused or aggravated by the accepted injury. The Board finds that appellant did not meet his burden of proof with respect to a left shoulder injury.

LEGAL PRECEDENT -- ISSUE 2

The Board has held that the subsequent progression of an employment-related condition "remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."⁴ If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, *i.e.*, "so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances."⁵ It is appellant's burden of proof to establish a consequential injury.⁶

ANALYSIS -- ISSUE 2

The Office accepted a disc herniation at L4-5 and appellant underwent lumbar surgery on August 16, 2004. Appellant then sustained a second disc herniation, with a second lumbar surgery in October 2004. It is appellant's contention that the second disc herniation and surgery is also employment related. Dr. Alberstone appeared to indicate that the second herniation was a consequence of the initial herniation; he briefly stated that the recurrent disc herniation would not have occurred were it not for the initial herniation. However, he did not provide a medical rationale or explanation for his opinion. The October 19, 2004 report referred to an incident a month earlier in the shower that resulted in a "sudden pop" in the lower back. An employment injury remains compensable only so long as the worsening is not shown to have been caused by an independent nonindustrial cause. Dr. Alberstone did not explain how the employment injury contributed to the disc herniation diagnosed in October 2004, in view of the described nonemployment incident. The Board finds that his report is of diminished probative value and is not sufficient to establish a subsequent disc herniation in this case. It is appellant's burden of proof to establish the condition and the resulting surgery as employment related, and the Board finds he did not meet his burden of proof.

⁴ *Raymond A. Nester*, 50 ECAB 173, 175 (1998).

⁵ *Id.*

⁶ *See Charles W. Downey*, 54 ECAB 421 (2003).

LEGAL PRECEDENT -- ISSUE 3

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁷

ANALYSIS -- ISSUE 3

Appellant filed a claim for compensation indicating that he had used two hours of leave on August 5 and 11, 2004. The Office was advised by the employing establishment that appellant received medical treatment, and requested that appellant submit any evidence regarding his treatment. The record does not contain any evidence regarding the claimed periods. It is appellant's burden of proof to submit probative medical evidence with respect to the claimed treatment and establish disability related to the accepted conditions. Accordingly, the Board finds that the Office properly denied the claim for compensation on August 5 and 11, 2004.

LEGAL PRECEDENT -- ISSUE 4

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows:

“Before review under [s]ection 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary....”

As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁸

ANALYSIS -- ISSUE 4

The Office issued a merit decision dated March 28, 2005. The request for a hearing was dated June 17, 2005. Since this is more than 30 days after the Office decision, appellant is not entitled to a hearing as a matter of right. The Board has held that the Office, in its broad discretionary authority to administer the Act, has power to hold hearings in circumstances where no legal provision is made for such hearings, and the Office must exercise its discretion in such circumstances.⁹ In this case, the Office advised appellant that he could submit additional relevant evidence on the issue through the reconsideration process. This is considered a proper

⁷ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

⁸ *See William F. Osborne*, 46 ECAB 198 (1994).

⁹ *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

exercise of the Office's discretionary authority.¹⁰ The Board finds that the Office properly denied appellant's request for a hearing.

CONCLUSION

The Board finds that appellant did not establish a left shoulder condition or a second disc herniation as causally related to the November 14, 2003 employment. The Board also finds that the Office properly denied a claim for compensation on August 5 and 11, 2004. In addition, the Board finds that the Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 26, March 28, 2005 and November 5, 2004 are affirmed.

Issued: March 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *Mary E. Hite*, 42 ECAB 641, 647 (1991).