United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 06-836**
	)	**Issued: September 1, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Carol Stream, IL, Employer	)	

Appearances:
M.P., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated September 30, 2005, denying modification of a February 15, 2005 decision repeating her claim. Appellant also requested an appeal of the Office's decision dated February 7, 2006, which denied her request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty causally related to factors of her federal employment; and (2) whether the Office properly denied her request for a review of the written record.

FACTUAL HISTORY

On November 5, 2004 appellant, then a 48-year-old full-time mail processor, filed an occupational disease claim for tendinitis in her left shoulder, left elbow and left wrist as a result

of repetitive motion activities at her job. She became aware of the disease or illness on August 6, 2004. Since 2002 she had performed limited duties as a nixie clerk utilizing only her left hand. The employing establishment controverted the claim, noting that appellant had been on limited duty since February 2, 2002 and did not do any repetitive work. It indicated that appellant used both of her hands to repair torn mail at her own pace and that she had not sorted mail in the last eight years.

In an October 1, 2004 medical report, Dr. Jacob Salomon, a Board-certified surgeon, stated:

> "[A]ppellant presented here on August 6, 2004 stating that her left shoulder, elbows and wrist started bothering her about three weeks ago while at work. She stated that she was using her left arm [a] lot for sorting mail. [Appellant] thought the pain would go away, it did not and she came in here complaining initially of the pain on August 6, 2004. We examined her and told her that this was a different injury from the one that she (sic) was being treated due to the swelling in the joints mainly the left wrist, left elbow and shoulder along with decreased ranges of motion and pain. We told her that, it was probably from overuse, due to [the] repetitive nature of her work in sorting the mail out with her left upper extremity and this repetitive work definitely caused hypertrophy and swelling in her left shoulder, left wrist and left elbow creating her conditions of left shoulder, left elbow and left wrist tend[i]nitis."

In a note dated November 18, 2004, a physician whose signature is illegible indicated that appellant had a left shoulder, left elbow and wrist strain. He prescribed no repetitive movement with the left arm for two weeks.

On December 16, 2004 the employing establishment provided the Office with a copy of the position description for a mail processor and a copy of a job analysis of the nixie table. The only difference between the job analysis and appellant's duties was that appellant was required to have a chair with arm supports and be seated at a table with no repetitive use of her hands. The employing establishment indicated that appellant did not perform the duties of a mail processor and disputed her allegations that she only used her left hand while working on the nixie table.

In a note dated December 29, 2004, Dr. Salomon indicated that appellant should work with a plastic tub and gurney sorting mail to relieve the pain in her left arm. On January 21, 2005 the employing establishment asked the physician for clarification of appellant's work restrictions.

By decision dated February 14, 2005, the Office denied appellant's claim, finding that the medical evidence did not establish that her condition resulted from the accepted work activities.

By letter dated February 17, 2005, appellant requested reconsideration of the February 14, 2005 decision. Appellant alleged that there was no job at the employing establishment that was modified to accommodate her restrictions and that her work was repetitive and involved sorting mail.

On February 26, 2005 appellant requested a review of the written record. The Board notes that both of these documents were forwarded to the district Office in Chicago on February 27, 2005 and then mailed to the Office in Kentucky, where they were received on March 1, 2005.

In support of her requests, appellant submitted a report by Dr. Salomon discussing a different injury and information with regard to a claim for stress.

On February 25, 2005 the Office received a description of appellant's modified job assignment from the employing establishment.

By decision dated September 30, 2005, the Office denied modification of the February 14, 2005 decision.

By decision dated February 7, 2006, the Office denied appellant's request for a review of the written record. The Office determined that appellant was not, as a matter of right, entitled to a review of the written record as she had previously requested reconsideration. The Office also reviewed the request under its discretionary authority and denied appellant's request as it determined that appellant's request could be equally well addressed by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that 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 an injury was sustained 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

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) a 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 diagnosed condition is causally related to the employment factors identified by the claimant.[4]

[1] 5 U.S.C. § 8101 *et. seq.*

[2] *Joe D. Cameron*, 41 ECAB 150 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Solomon Polen*, 51 ECAB 441 (2000); *see also Michael E. Smith*, 50 ECAB 265 (1999).

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to submit sufficient medical evidence, which establishes that her left upper extremity tendinitis was caused or aggravated by her work factors. Dr. Salomon indicated that on October 1, 2004 appellant's left shoulder, elbow and wrist conditions were "probably caused by overuse, due to repetitive nature of her work in sorting the mail out with her left shoulder, left wrist and left elbow, creating her conditions of left shoulder, left elbow and left wrist tend[i]nitis." This opinion that appellant's condition was "probably caused" by the duties of her federal employment is speculative. An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relation.[5] Moreover, Dr. Salmon appears to have relied on a history of repetitive motion in appellant's modified duty assignment that is not supported by the evidence of record. Appellant has failed to submit rationalized medical evidence supporting that her left upper extremity tendinitis is causally related to her federal employment. The Board finds that the Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that, before review under section 8128(a), a claimant not satisfied with a decision of the Secretary of Labor is entitled, on a request made within 30 days after the date of issuance of the decision, to a hearing on her claim.[6]

The claimant may choose between two formats: an oral hearing or a review of the written record.[7] The requirements are the same for either choice.[8] A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by the postmark or other carrier's date marking.[9] Furthermore, appellant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[10] However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record and must exercise this discretion.[11]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim on February 14, 2005. By letter dated February 17, 2005, she requested reconsideration of the Office's decision. On February 26, 2005 appellant

[5] *Patricia J. Glenn*, 53 ECAB 159, 161 (2001).

[6] 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

[7] 20 C.F.R. § 10.615.

[8] *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

[9] 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

[10] 20 C.F.R. § 10.616(a).

[11] *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

subsequently requested a review of the written record. In order to be entitled to a review of the written record, appellant must submit the request within 30 days of the Office's decision and must not have previously submitted a reconsideration request on the same decision. As appellant's request for reconsideration was made on February 17, 2005 it was prior to the February 26, 2005 request for review of the written record. Accordingly, appellant was not entitled to a review of the written record as a matter of right. The Office reviewed appellant's request under its discretionary authority and denied the request for the reason that the issue could equally well addressed by requesting reconsideration and submitting additional medical evidence. The Office properly denied appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty causally related to factors of her federal employment. The Board further finds that the Office properly denied appellant's request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 7, 2006 and September 30, 2005 are affirmed.

Issued: September 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