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

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| **C.R., Appellant** | ) | |
| **and** | ) | **Docket No. 06-1284** |
| | ) | **Issued: September 28, 2006** |
| **U.S. POSTAL SERVICE, NORTHLAND DISTRICT, St. Paul, MN, Employer** | ) | |

*Appearances:*
*C.R., 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
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On May 15, 2006 appellant, filed a timely appeal of a December 7, 2005 merit decision from the Office of Workers' Compensation Programs denying his claim for compensation and an April 14, 2006 nonmerit decision from the Office denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant has established that he sustained a left rotator cuff tear in the performance of his duty, causally related to factors of his federal employment; and (2) whether appellant filed a timely request for an oral hearing.

### ***FACTUAL HISTORY***

On July 27, 2005 appellant, a 55-year-old mail handler, filed an occupational disease claim (Form CA-2), alleging problems with his left shoulder. According to the form he became

aware of his condition on September 1, 2004. Appellant listed his condition as a "sore shoulder."

By letter dated August 17, 2005, the employing establishment controverted appellant's claim and asserted that his fact of injury was questionable. It also contended that there had not been a "certain diagnosis." The employing establishment pointed out that the initial diagnosis from appellant's doctor on May 5, 2005, biceps tendinitis, eventually became a tear in one tendon. Further, it mentioned that initially appellant's x-rays were unremarkable, his symptoms increased after he was involved in a car wreck in April and he appeared to have metal in his arm.

By letter dated August 17, 2005, the Office advised appellant that he needed to submit additional evidence with respect to his claim. Specifically, appellant was asked to provide, within 30 days from the date of the letter, details about employment-related activities he believed contributed to his condition and a comprehensive medical report from a licensed medical doctor with, among other information, a diagnosis, results of tests and the cause of his condition. In addition, the physician's report needed to include details of how exposure in the federal workplace contributed to appellant's condition.

The Office received the following information on August 19 and September 15, 2005. Appellant stated in a July 20, 2005 letter, received by the Office on August 19, 2005, that he began experiencing pain in his left shoulder sometime in August 2004 and that the pain began occurring on a daily basis in April 2005. He sought help from a chiropractor who manipulated his arm in order to demonstrate the type of movement that was causing the pain in his arm. Appellant further stated that, when the chiropractor moved his arm, he recognized the movement as the same motion he used when working at the employing establishment moving containers.

In a report dated May 4, 2005, Dr. Anthony Richie, an internist, diagnosed appellant with biceps tendinitis. He agreed with appellant's belief that his shoulder pain was related to the maneuvers he undertook while pulling a heavy cart at work. Dr. Richie also noted that appellant claimed that his symptoms became more frequent after a car crash in early April. Appellant continued to see Dr. Richie for treatment and, on June 14, 2005, Dr. Richie referred him to an orthopedic specialist.

On July 19, 2005 Dr. Jay Johnson, an orthopedic surgeon, at Capital Orthopedics, LTD., referred appellant for a magnetic resonance imaging (MRI) scan and mentioned some metal in appellant's arm. On September 7, 2005 Dr. Michael D. McDonald, an orthopedic surgeon, also at Capital Orthopedics, LTD., reviewed appellant's medical history and MRI scan. Dr. McDonald diagnosed appellant with a one centimeter rotator cuff tear and a Type II acromion in his left shoulder and recommended arthroscopic surgery.

The Office, by decision dated October 6, 2005, accepted appellant's claim for bicipital tenosynovitis in his left shoulder. However, the Office did not make a decision regarding appellant's left rotator cuff tear. Instead, it requested a supplemental report from appellant's physician describing whether the tear was caused by work activities or nonwork activities, such as a motor vehicle accident.

By letter dated October 24, 2005, the employing establishment again controverted appellant's claim. It asserted that appellant's medical evidence demonstrated that his injuries were caused by a car crash or bicycling instead of work duties and they questioned whether the motion causing the pain in his left shoulder was consistent with his employment duties.

By report dated November 14, 2006, Dr. McDonald gave his opinion, based on appellant's medical history and the MRI scan, that appellant had developed degeneration of his rotator cuff tendon because of job-related activities such as heavy lifting to load trucks. He also asserted that a motor vehicle accident exacerbated appellant's condition. Finally, Dr. McDonald stated that work-related activities led to a weakening of the rotator cuff tendon which "very likely" caused the tendon to tear during the motor vehicle accident.

By decision dated December 7, 2005, the Office denied appellant's claim for a left rotator tear and related medical treatment, including surgery, on the grounds that causal relationship was not established. The Office found that, according to the medical evidence, the rotator cuff tear resulted from the nonwork-related motor vehicle accident and that Dr. McDonald's opinion that appellant's weakened tendon "very likely" tore at the time of the motor vehicle accident was too speculative.

In a separate letter dated December 7, 2005, the Office also requested a supplemental narrative report from appellant's physician discussing whether appellant's work-related tendinitis had been resolved. Dr. McDonald responded for appellant by report, dated December 15, 2005, and stated that the tendinitis had not been resolved. He stated further that there was a relationship between progressive tendinitis and rotator cuff tearing. Therefore, Dr. McDonald did not anticipate any resolution of appellant's "shoulder problem" without repair to the tear.

Dr. McDonald additionally requested authorization to operate on appellant's shoulder. The Office subsequently authorized arthroscopy surgery for appellant by letter dated December 27, 2005 addressed to Capitol Orthopedics, LTD, appellant's doctors. The surgery was performed on January 16, 2006.

On January 26, 2006 the Office informed Capitol Orthopedics that the surgery in appellant's shoulder was inadvertently authorized. On February 16, 2006 the Office sent an amended letter to Capitol Orthopedics explaining additionally that appellant's claim was not accepted for the condition requiring the surgery.

On February 10, 2006 appellant contacted the Office about the rescission of its previous authorization for shoulder surgery. The Office responded by letter, dated February 16, 2006, that the reason for the rescission of the authorization for surgery[1] was that his claim for compensation for the rotator cuff tear had previously been denied in the Office's December 7, 2005 decision and that, if he disagreed with the December 7, 2005 decision, he could exercise his appeal rights.

Appellant requested an oral hearing before an Office hearing representative. The postmark for the request was dated March 1, 2006 and received by the Office's Branch of

[1] As appellant did not raise this issue on appeal, the Board has not addressed it. *See* 20 C.F.R. § 501.2(c).

Hearings and Review on March 9, 2006. By decision dated April 14, 2006, the Office denied the request for an oral hearing as untimely as the Office had issued its decision on December 7, 2005 and the hearing request was postmarked March 1, 2006. Additionally, the Office found that the issue could equally well be addressed through the reconsideration process.

## ***LEGAL PRECEDENT -- ISSUE 1***

To establish that an injury was sustained in the performance of duty in an occupational disease claim,[2] an employee must submit the following: (1) medical evidence establishing the presence or existence of a condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the condition; and (3) medical evidence establishing that the employment factors identified by the employee were the proximate cause of the condition or illness, 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 employee.[3]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between an employee's diagnosed conditions and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed conditions and the specific employment factors identified by the employee.[4]

The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[5]

## ***ANALYSIS -- ISSUE 1***

The Office accepted that appellant sustained bicipital tenosynovitis of the left shoulder due to the implicated factors of his federal employment. The evidence establishes that appellant suffered a rotator cuff tear in his left shoulder. The issue is whether the rotator cuff tear of the left shoulder resulted from those same implicated employment factors. Generally, this can be established only by medical evidence provided by appellant. The Board finds that appellant did

[2] An occupational disease or illness means a condition produced in the work environment over a period longer than a single workday or shift by such factors as systemic infection, continued or repeated stress or strain or other continued or repeated conditions or factors of the work environment. *William Taylor*, 50 ECAB 234 (1999); *see also* 20 C.F.R. § 10.5(q).

[3] *Donna L. Mims*, 53 ECAB 730 (2002).

[4] *Id*.

[5] *Id*.

not meet his burden of proof in establishing that the claimed condition was causally related to factors of his federal employment.

In response to the Office's request for a supplemental report, Dr. McDonald was unable, in his November 14, 2006 report, to provide a definite opinion. He stated that the rotator cuff tear "could have been caused at the time of the motor vehicle accident" and that work-related activities, such as heavy lifting to load trucks, weakened the tendon so that at the time of the accident "it is very likely" that the weakened tendon tore. As Dr. McDonald was unable to state the cause of the rotator cuff tear and could only speculate that it tore during the nonemployment-related motor vehicle accident because it had been weakened by work-related activities, this report is of diminished probative value and is insufficient to establish appellant's claim.[6]

The Board notes that appellant appears to be claiming, through Dr. McDonald, that the left torn rotator cuff tear he sustained is a consequential injury. A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. As in proving the cause of a primary injury, the claimant must submit a rationalized medical opinion in order to show that a consequential injury was a result of the original workplace injury.[7] However, as Dr. McDonald's report is speculative, appellant has not met his burden of proof to establish that the left torn rotator cuff was a consequence of the accepted bicipital tenosynovitis of the left shoulder.

The Board finds that appellant has not met his burden of proof to provide rationalized medical evidence sufficient to establish that the implicated work factors caused his left shoulder rotator cuff tear he has not met his burden of proof to establish that the medical treatment was for the effects of the employment injury.[8]

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8124 of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.[9] The regulations further elaborate on this requirement. Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[10] Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as

[6] *Debra L. Dillworth*, 57 ECAB ___ (Docket No. 05-159, issued March 17, 2006).

[7] *Id.*

[8] *See Carolyn F. Allen*, 47 ECAB 240 (1995).

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.615.

determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[11]

The Board has held that the Office, in its broad discretionary authority to administer the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[12]

## ***ANALYSIS -- ISSUE 2***

Appellant's request for an oral hearing was postmarked March 1, 2006 and received by the Office on March 14, 2006, more than 30 days after the Office issued its December 7, 2005 decision. Therefore, the Board finds that appellant is not entitled to a hearing as a matter of right. The Board further finds that the Office properly exercised its discretion in denying a hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration.

## ***CONCLUSION***

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a tear in his left shoulder rotator cuff in the performance of duty, causally related to factors of his federal employment. The Board further finds that the Office properly denied appellant's request for a hearing as untimely filed.

[11] 20 C.F.R. § 10.616(a).

[12] *Claudio Vasquez*, 52 ECAB 496 (2001).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 14, 2006 and December 7, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 28, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board