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

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| **H.D., Appellant** | ) | |
| **and** | ) | **Docket No. 06-1970** |
| | ) | **Issued: April 19, 2007** |
| **DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Bay Pines, FL, Employer** | ) | |

*Appearances:*
*Appellant, 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 August 23, 2006 appellant filed a timely appeal from a May 23, 2006 decision of the Office of Workers' Compensation Programs which denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish that he sustained an employment-related injury on September 10, 2003.

### ***FACTUAL HISTORY***

On October 6, 2003 appellant, then a 53-year-old shuttle driver, filed a Form CA-1, traumatic injury claim, alleging that on September 10, 2003 he injured his right shoulder when picking up 50-pound buckets of chlorine. On the claim form, his supervisor, Donnell Singleton, stated that appellant's disability was not caused by a work injury because he reported to his physician that the shoulder pain was caused by bowling. By letter dated October 24, 2003, the

Office informed appellant of the type of evidence needed to support his claim and the employing establishment controverted the claim, alleging that there was contradictory medical evidence regarding the source of appellant's injury. The employing establishment submitted a September 10, 2003 report in which Dr. Jeffrey Kuch, Board-certified in family and internal medicine, advised that appellant reported a painful right shoulder from bowling, and a September 11, 2003 report in which Dr. Theophil T. Sutton, Board-certified in emergency and occupational medicine and an employee health physician, advised that appellant first reported that he hurt his right shoulder lifting a bucket at work the previous day but that, after he reviewed appellant's medical record, he asked appellant about his report the previous day and advised that appellant declined to be treated at employee health. A September 10, 2003 right shoulder x-ray was reported as normal.

The record also contains a September 24, 2003 report in which Dr. Michael P. Shear, a Board-certified internist, advised that appellant was argumentative and had multiple chronic complaints. Dr. Shear discussed appellant's medication regimen. An undated and unsigned accident report noted that appellant reported an injury to his right arm biceps and shoulder when picking up a five-gallon bucket of chlorine tablets.

In a statement dated November 24, 2003, appellant described his work duties of delivering supplies and alleged that Dr. Kuch reported the history of injury incorrectly, stating that he told the physician about the employment injury and also reported that he was on a bowling team. Appellant also submitted physical therapy notes dating from September 24 to October 23, 2003, and nursing notes dated October 20 and 27, 2003. In a September 12, 2003 report, Dr. Kuch advised that appellant's shoulder still bothered him, and in an October 6, 2003 report, stated that "he now for the first time tells me he hurt [his shoulder] at work when before he said it was from bowling." He advised that appellant could return to work but could not lift over two pounds.

By decision dated December 2, 2003, the Office accepted that appellant sustained a lifting incident on September 10, 2003 but that, as the medical evidence did not provide a diagnosis caused by this event, he had not established that he sustained an employment-related injury. On December 31, 2003 appellant requested a hearing and submitted a December 22, 2003 report in which Dr. Victor J. Bilotta, Board-certified in orthopedic surgery, noted the history of injury and appellant's complaint of right shoulder pain. Dr. Bilotta noted findings on examination and diagnosed mild impingement.[1] In a report dated March 4, 2004, Penny L. Myers, a nurse practitioner, stated that she first saw appellant on October 27, 2003 complaining of right shoulder pain. She described appellant's job duties and opined that these repetitive activities could cause a bursitis injury. On April 17, 2004 Mr. Singleton advised that appellant reported a shoulder injury to him on September 9, 2003 when he was lifting heavy buckets of chlorine. He advised that Catherine Cramer, workers' compensation program manager, filled out appellant's claim form but that he signed it.

At the hearing, held on November 30, 2004 appellant testified regarding the September 10, 2003 lifting incident, his claimed injury and his job duties. The hearing

[1] Drs. Kuch, Sutton, Shear and Bilotta are all employees of the employing establishment.

representative informed him of the type of medical evidence needed to support his claim. Appellant submitted a December 22, 2004 report in which Dr. Bilotta stated "It is my opinion, within reasonable medical probability, that the shoulder complaint that [appellant] had when he consulted me on December 22, 2003 was directly related to lifting 50-pound containers of chlorine while employed at [the employing establishment]."

By decision dated February 10, 2005, the hearing representative affirmed the December 2, 2003 decision on the grounds that the medical evidence was insufficient to establish causal relationship. On February 3, 2006 appellant requested reconsideration and submitted an April 12, 2006 report in which Dr. Bilotta advised:

> "I saw [appellant] in orthopedic consultation in December 2003. [He] gave me a history of injuring his shoulder on September 10, 2003. [Appellant] was lifting 50-gallon containers of chlorine at that time. He had treatment for the shoulder ordered by primary care which included occupational therapy. [Appellant] failed to respond to that treatment and was seen in my office. I diagnosed him with bursitis of the shoulder that was caused by lifting. Commonly bursitis can be caused by over stressing the shoulder which was certainly the case as described by [appellant]. I injected his shoulder and advised him to continue shoulder exercises. I have no record of seeing [him] since that time. [He gave] a straightforward history that is consistent with the mechanism of injury. I would consider the proximate cause of his bursitis to be the lifting injury. These findings are within a reasonable medical certainty."

In a May 23, 2006 decision, the Office denied modification of the prior decisions.

## ***LEGAL PRECEDENT***

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 timely filed within the applicable time limitation period 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

Office regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[4] To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an

[2] 5 U.S.C. §§ 8101-8193.

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[5]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[6] 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 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] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[8]

Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[9] Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[10]

## ***ANALYSIS***

The Office found and the Board agrees, that the September 10, 2003 incident occurred. The Board also finds that the reports of Drs. Kuch, Sutton and Shear are insufficient to establish appellant's claim as they do not contain sufficient medical rationale explaining the nature of the

[5] *Gary J. Watling, supra* note 3.

[6] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[7] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[8] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[9] *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[10] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

relationship between appellant's condition and the September 10, 2003 lifting incident.[11] Furthermore, Ms. Myers report does not constitute competent medical evidence as reports submitted by nurse practitioners and physician's assistants are not considered medical evidence as these persons are not considered physicians under the Act.[12] The Board however finds that, while Dr. Bilotta's reports, taken as a whole, lack detailed medical rationale sufficient to discharge appellant's burden of proof to establish by the weight of reliable, substantial and probative evidence that his right shoulder condition was causally related to the September 10, 2003 work incident, this does not mean that they may be completely disregarded by the Office. It merely means that their probative value is diminished. In his reports dated December 22, 2003, December 22, 2004 and April 12, 2006, Dr. Bilotta reported a history of injury consistent with the September 10, 2003 employment incident. In the April 12, 2006 report, he noted the history of injury and that, when appellant failed to respond to initial treatment, he was seen for orthopedic consultation. Dr. Bilotta noted his diagnosis of bursitis of the shoulder and opined that bursitis could be caused by over stressing the shoulder "which was certainly the case" as described by appellant. He stated that appellant gave a straightforward history that was consistent with the mechanism of injury and that, within a reasonable medical certainty, would consider the proximate cause of his bursitis to be the lifting injury.

In the absence of medical evidence to the contrary, Dr. Bilotta's reports are sufficient to establish a *prima facie* case such that the Office should further develop the record to determine if the diagnosed bursitis condition of appellant's right shoulder was caused by his federal employment.[13] It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[14] The case shall therefore be remanded to the Office to further develop the medical evidence to determine if appellant's diagnosed right shoulder condition was caused or aggravated by the September 10, 2003 employment incident and, if so, whether appellant had any disability therefrom.[15] After this and such further development as deemed necessary, the Office shall issue an appropriate decision.

## ***CONCLUSION***

The Board finds this case is not in posture for decision regarding whether appellant's left knee and right shoulder conditions were caused by the September 10, 2003 work incident.

[11] *Supra* note 7.

[12] 5 U.S.C. § 8101(2); *see Sean O. O'Connell*, 56 ECAB ___ (Docket No. 04-1746, issued December 20, 2004).

[13] *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

[14] *See Jimmy A. Hammons, id.*

[15] *Cheryl L. Decavitch, supra* note 9; *Fereidoon Kharabi, supra* note 10.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 23, 2006 be vacated and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: April 19, 2007
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