United States Department of Labor
Employees' Compensation Appeals Board

W.F., Appellant	)	
and	)	**Docket No. 07-206**
	)	**Issued: April 11, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, New York, NY, 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 October 30, 2006 appellant filed a timely appeal from a September 15, 2006 nonmerit decision of the Office of Workers' Compensation Programs that denied his reconsideration request. He also appealed an April 11, 2006 merit decision that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's reconsideration request without conducting a merit review.

FACTUAL HISTORY

On September 7, 2005 appellant, then a 46-year-old flat sorter operator, filed a traumatic injury claim stating that he sustained a strain or sprain in the middle of his back while sweeping a

tray of mail onto a skid that day. He related that he was sweeping the mail from a flat sorter machine and turning to place it on the skid when his "back gave out." Appellant stopped work on September 7, 2005 and returned on September 12, 2005. The employing establishment, in an undated injury notification report, characterized appellant's claimed injury as a "muscle spasm in back" and noted that he reported his injury on the day he sustained it.

On September 27, 2005 the Office requested additional factual and medical information concerning appellant's claim. In response, appellant provided a medical center form he completed on October 3, 2005, in which he stated that he was injured while placing mail on a "skid" on a flat sorter machine and characterized his injury as a "left shoulder spasm." He also provided medical evidence. In an October 3, 2005 report, Dr. F. Santi DiFranco, a Board-certified internist, diagnosed left shoulder strain and indicated that appellant sustained a job-related injury to his left shoulder on September 7, 2005. In an October 17, 2005 report, Dr. DiFranco stated that appellant presented after straining his left shoulder at work "secondary to heavy lifting, sorting and sweeping mail on September 7, 2005." On examination, Dr. DiFranco found decreased range of motion but no pain or stiffness in his left shoulder. Dr. DiFranco diagnosed left shoulder strain and concluded: "Based on the history provided, the injury to the left shoulder was causally related to the above-mentioned accident."

By decision dated December 9, 2005, the Office denied appellant's claim. The Office found that the evidence did not support that appellant sustained an injury at the time, place and in the manner alleged.

On December 27, 2005 appellant requested a review of the written record. In a December 20, 2005 statement, he advised that he experienced upper back spasms for several days after he filed his traumatic injury claim and did not realize that he had strained his left shoulder until the spasms began to subside. Appellant stated that he reported his shoulder strain to his physician on October 3, 2005.

In support of his request for a review of the written record, appellant submitted an undated disability note from Dr. DiFranco, stating that appellant had sustained a "sprain/strain" on September 7, 2005 and would return to work on September 12, 2005 with restrictions prohibiting him from performing heavy lifting, twisting or pulling until September 30, 2005. The disability note stated that Dr. DiFranco had last seen appellant on August 30, 2005. Appellant also submitted a September 7, 2005 discharge report from Anna Kulishevsky, a physician's assistant with St. Vincent Memorial Hospital. Ms. Kulishevsky provided a discharge instruction sheet for "sprain/strain, low back" which recommended that appellant avoid heavy lifting for three to four days.

Appellant further provided several statements from colleagues. Mark Gerstein reported that on September 7, 2005 he "accompanied [appellant] to St. Vincent Hospital [e]mergency [r]oom. Where he was treated and sent home." In a December 21, 2005 statement, Laverne Starks reported that she witnessed appellant "down on one knee on the left hand side of the AFSM 100 machine." In a December 20, 2005 statement, S. Carrasquillo reported that, on the date of appellant's claimed injury, he had assisted him from the floor onto a skid. Appellant also submitted a September 7, 2005 case record from the employing establishment's health unit,

indicating that he experienced a left middle back spasm that morning and was taken to St. Vincent Memorial Hospital, where he was treated and released.

By decision dated April 11, 2006, the Office hearing representative affirmed the denial of appellant's claim on the grounds that the evidence of record was insufficient to establish that he sustained a personal injury at the time, place and in the manner alleged.

Appellant requested reconsideration on May 12, 2006. He stated that he was submitting two additional witness statements from his colleague Kevin Walsh[1] and his wife. Appellant indicated that he initially experienced muscle spasms in the middle of his back, and that when the muscle spasms subsided he realized that he had in fact injured his left shoulder. He submitted a May 8, 2006 statement from his wife, who stated that he had initially believed that he had injured his middle back, but realized after she massaged his back and discovered a knot on his left shoulder muscle, that the injury was in fact to his left shoulder.

By decision dated September 15, 2006, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[3] 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.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence.[6] An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an

[1] Mr. Walsh's statement does not appear in the record.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

[5] *See Louise F. Garnett*, 47 ECAB 639 (1996).

[6] *Charles B. Ward*, 38 ECAB 667 (1987).

injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[7] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[8] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statements in determining whether a *prima facie* case has been established.[9] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative force and will stand unless refuted by strong or persuasive evidence.[10]

The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[11] As part of this burden, the claimant must present rationalized medical evidence based upon a complete factual and medical background showing causal relationship.[12] An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his or her claimed injury and his or her employment.[13] To establish a causal relationship, appellant must submit a physician's report, in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and his medical history, state whether the employment injury caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant established that he experienced an employment incident at the time, place and in the manner alleged.

The record reflects that the employment incident, appellant's sweeping of mail onto a skid, took place on September 7, 2005. Appellant stated that he was placing mail from a file sorter machine onto a skid and experienced a muscle spasm in his back. Appellant's colleagues Ms. Starks and S. Carrasquillo confirmed through statements that they saw appellant on the workroom floor by his sorter machine on September 7, 2005. This is consistent with the

[7] *See Gene A. McCracken*, 46 ECAB 593 (1995).

[8] *See Louise F. Garnett*, *supra* note 5.

[9] *Linda S. Christian*, 46 ECAB 598 (1995).

[10] *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[11] *See John J. Carlone*, 41 ECAB 354 (1989).

[12] *Joseph T. Gulla*, 36 ECAB 516 (1985).

[13] *Donald W. Long*, 41 ECAB 142 (1989).

[14] *Id.*

employment incident as alleged by appellant. Moreover, appellant sought prompt medical treatment as employing establishment records establish that appellant was taken to a hospital and treated on September 7, 2005. Although appellant initially stated that he experienced a middle back strain and later realized that he in fact injured his left shoulder, this is not sufficient to cast serious doubt on the validity of his claims.[15] He explained the discrepancy, stating that he was initially unable to pinpoint the location of his claimed injury due to muscle spasms in his upper middle back, but later came to realize the precise location of his claimed injury when the spasms subsided. As noted above, a claimant's statement concerning a claimed incident is entitled to great probative force and must be refuted by strong or persuasive evidence.[16] The Board finds that it is plausible that appellant, experiencing back spasms in the middle of his back, could have been unable to identify the precise location of his complaint until the most severe spasms subsided. Furthermore, symptoms in the middle of the back and the left shoulder are in relatively close proximity. While the September 7, 2005 hospital discharge instructions were for a low back strain, this appears to be an anomaly as these instructions appear to provide general information on the condition but do not reference facts specific to appellant's presenting symptoms. There are also no other contemporaneous records indicating any low back complaints. Accordingly, the Board finds that appellant established that he experienced an employment incident at the time, place and in the manner alleged.

However, the Board finds that appellant did not meet his burden of proof in establishing a causal relationship between the September 7, 2005, employment incident and his diagnosed left shoulder strain. Appellant submitted reports from Dr. DiFranco providing support for causal relationship. Dr. DiFranco's October 3, 2005 progress note characterized appellant's injury as "job related" but did not elaborate. His October 17, 2005 report stated that appellant experienced a left shoulder strain "secondary to heavy lifting, sorting and sweeping mail on September 7, 2005." Appellant reported to Dr. DiFranco that the hospital diagnosed him with left shoulder muscle strain and that he had experienced decreased range of motion in the left shoulder. Dr. DiFranco concluded that appellant's injury was causally related to the September 7, 2005 employment incident, based on "the history provided." His reports are insufficient to meet appellant's burden of proof in establishing causal relationship, because they are not fortified by sufficient rationale or explanation. The Board has held that a medical opinion not supported by explanation or rationale is of diminished probative value.[17] Dr. DiFranco did not explain precisely how appellant's actions on September 7, 2005 physically

[15] *See, e.g., V.F.*, 58 ECAB __ (Docket No. 06-1496, issued January 30, 2007) (where appellant's inconsistent characterization of his employment factors and his failure to explain such discrepancies contributed to serious doubt concerning the validity of his occupational disease claim); *John W. Graves*, 52 ECAB 160 (2000) (where appellant's demonstrably false statements raised doubts concerning the veracity of his claims).

[16] *See supra* note 10.

[17] In order to be considered probative rationalized medical evidence, a physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Victor J. Woodhams, supra* note 4; *Steven S. Saleh*, 55 ECAB 169, 172 (2003). The Board has held that a medical opinion not fortified by medical rationale is of little probative value. *Caroline Thomas*, 51 ECAB 451, 456 n. 10 (2000); *Brenda L. Dubuque*, 55 ECAB 212, 217 (2004).

caused his left shoulder condition. Accordingly, the Board finds that Dr. DiFranco's reports are not sufficiently probative on the issue of causal relationship.

The Board also notes that appellant submitted an emergency room discharge report from Ms. Kulishevsky. As Ms. Kulishevsky is a physician's assistant, not a physician, her report cannot be considered competent medical evidence and is of no probative value.[18]

Accordingly, the Board finds that appellant failed to meet his burden of proof in establishing that he sustained a traumatic injury in the performance of duty, because the medical opinion evidence of record does not establish that appellant's diagnosed condition is causally related to the September 7, 2005 employment incident.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.[19] The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[20]

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.[21] 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.[22]

---

[18] A physician's assistant's reports are of no probative value as a physician's assistant is not considered a physician under the Act. *See George H. Clark*, 56 ECAB ___ (Docket No. 04-1572, issued November 30, 2004); *John D. Williams*, 37 ECAB 238 (1985). *See also* 5 U.S.C. § 8101(2).

[19] 20 C.F.R. § 10.606(b)(2) (1999).

[20] *Id.*

[21] 20 C.F.R. § 10.608(b) (1999).

[22] *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

The Board finds that the Office properly dismissed appellant's reconsideration request without conducting a merit review.

Appellant did not show that the Office erroneously interpreted a point of fact nor did he advance a new and relevant legal argument. His May 12, 2006 statement in support of his reconsideration request, was generally repetitious of appellant's prior arguments with regard to how his claimed injury was sustained and how he became aware of it.[23] Appellant also asserted that the Office did not consider a report submitted from the employing establishment's health unit documenting his treatment there on the day of his injury. However, this argument has no reasonable color of validity[24] as the record contains no indication that pertinent evidence did not receive consideration by the Office.

Appellant also provided, on reconsideration, a May 8, 2006 statement from his wife, which stated that appellant experienced muscle spasms and only later discovered that he had sustained a left shoulder strain. While new, his wife's statement is not relevant as it essentially repeats what appellant told her concerning the etiology of his injury claim. Appellant had previously provided the same type of information to the Office. Therefore, his wife's statement does not constitute new and relevant evidence.

Accordingly, the Board finds that the Office properly denied appellant's reconsideration request without conducting a merit review of the claim.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained a traumatic injury in the performance of duty. The Board also finds that the Office properly denied appellant's reconsideration request without conducting a merit review.

[23] Submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim. *Brent A. Barnes*, 56 ECAB ___ (Docket No. 04-2025, issued February 15, 2005).

[24] *See Jennifer A. Guillary*, 57 ECAB ___ (Docket No. 06-208, issued March 13, 2005) (while a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 15, 2006 decision of the Office is affirmed. The April 11, 2006 is affirmed as modified.

Issued: April 11, 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