United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 07-1847**
	)	**Issued: November 19. 2007**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2007 appellant filed a timely appeal from a March 9, 2007 Office of Workers' Compensation Programs' decision denying his request for reconsideration and a January 10, 2007 decision denying his claim for an injury on October 12, 2006. 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 sustained an injury on October 12, 2006 while in the performance of duty; and (2) whether the Office abused its discretion in denying his request for reconsideration.

FACTUAL HISTORY

On October 18, 2006 appellant, then a 52-year-old mail handler, filed a claim alleging that on October 12, 2006 he sprained his left shoulder while unloading mail trucks and pulling

APCs (all purpose containers). In a written statement he noted that, for 23 years his duties had included pulling BMCs (bulk mail containers), APCs, wire cages and hampers.[1]

In reports dated October 18 and 24, 2006, Dr. Remigio L. Abello diagnosed a sprain of the left shoulder and upper arm. He indicated that appellant was pulling APCs on October 12, 2006 when he "heard something pop." An October 18, 2006 x-ray of appellant's left shoulder was reported as normal.

In reports dated October 19 and November 21, 2006, Dr. Matthew Levy, an attending orthopedic surgeon, stated that appellant's work duties included pulling and pushing carts and unloading trucks. He recently experienced an episode where his "arch fell" on the left side, which he felt had caused him hip and shoulder problems. Appellant also noted a small knot on his left shoulder and that he had been having trouble sleeping. Dr. Levy provided findings on physical examination and diagnosed a torn rotator cuff of the left shoulder.[2]

Appellant also submitted reports from physical therapists.

On December 4, 2006 the Office requested additional evidence, including a medical report containing a rationalized explanation as to how appellant's diagnosed left shoulder strain and rotator cuff tear were causally related to the October 12, 2006 work incident. It noted that he had alleged that his left shoulder injury occurred as the result of a specific event on October 12, 2006. However, it appeared that appellant had also attributed the injury to 23 years of job activities. The Office asked him to clarify whether his injury occurred due to a specific incident on October 12, 2006 or whether it was due to events or factors over the course of more than one work shift. Appellant did not respond.

By decision dated January 10, 2007, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained an injury to his left shoulder on October 12, 2006 causally related to his employment.

On February 6, 2007 appellant requested reconsideration of his claim. He stated, "I feel as though the entire profile of my medical condition was not presented." Appellant noted that he had changed physicians and indicated that his new physician, Dr. Anthony George, would provide additional evidence. No additional evidence was submitted.

[1] Appellant filed an occupational disease claim for the same injury and date.

[2] A November 6, 2006 MRI (magnetic resonance imaging) scan report of appellant's left upper extremity indicated a focal, full thickness tear and partial fiber retraction of the supraspinatus tendon and degenerative hypertrophic changes at the acromioclavicular (AC) joint without gross impingement.

By decision dated March 9, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review.[3]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden to establish the essential elements of his 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, that an injury was sustained in the performance of duty as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[7] An employee may establish that the employment incident occurred as alleged but fail to show that his disability or condition relates to the employment incident.

To establish a causal relationship between a claimant's condition and any attendant disability claimed and the employment event or incident, he must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's 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.[8]

[3] Subsequent to the March 9, 2007 decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[4] 5 U.S.C. §§ 8101-8193.

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

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

[7] *Shirley A. Temple*, 48 ECAB 404 (1997).

[8] *Gary J. Watling*, 52 ECAB 278 (2001); *id*.

ANALYSIS -- ISSUE 1

The Board finds that the evidence is insufficient to establish that appellant sustained a left shoulder injury on October 12, 2006 while in the performance of duty.

Dr. Abello diagnosed a sprain of the left shoulder and upper arm in his reports. He indicated that appellant was pulling APCs on October 12, 2006 when he "heard something pop." However, Dr. Abello did not describe the mechanism of injury, *i.e.*, how the act of pulling APCs on October 12, 2006 caused a left upper extremity sprain. He did not provide medical rationale explaining how appellant's left shoulder sprain was causally related to the October 12, 2006 work incident. Therefore, Dr. Abello's reports are insufficient to establish that appellant sustained an employment-related left shoulder injury on October 12, 2006.

Dr. Levy stated that appellant's work duties included pulling and pushing carts and unloading trucks. Recently, appellant experienced an incident where his "arch fell" on the left side and he experienced hip and shoulder problems. There was a knot on his left shoulder and appellant developed sleep problems. Dr. Levy provided findings on physical examination and diagnosed a torn rotator cuff of the left shoulder. However, the history of the injury given by him differs from the history provided by appellant and Dr. Abello, that he was unloading trucks and pulling APCs. Dr. Levy did not provide a rationalized medical explanation as to how appellant's torn left rotator cuff was caused by an event or factor of his employment. Therefore, the report from Dr. Levy is insufficient to discharge appellant's burden of proof as to causal relationship.

Appellant submitted reports from his physical therapists. However, as a physical therapist is not a physician under the Act, these reports do not constitute probative medical evidence.[9]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[10] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific

[9] *See Jennifer L. Sharp*, 48 ECAB 209 (1996).

[10] 5 U.S.C. § 8128(a).

point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[11] When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[12]

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant submitted no new medical evidence. He stated his feeling that the entire profile of his medical condition was not presented. Appellant noted that he had changed physicians and indicated that his new physician would provide additional evidence. However, no additional evidence was submitted. Appellant did not submit evidence of whether his left shoulder condition was caused by his work activities on October 12, 2006 or other employment factors. Additionally, he did not respond to the Office's request that he clarify whether his left shoulder injury occurred due to a specific incident on October 12, 2006 or whether it was due to events over the course of more than one work shift. For these reasons, appellant's statement does not constitute relevant and pertinent evidence not previously considered by the Office. He also did not submit any evidence showing that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law; or advance a relevant legal argument not previously considered by it; or submit relevant and pertinent evidence not previously considered by the Office, it did not abuse its discretion in denying his request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a left shoulder injury on October 12, 2006 while in the performance of duty. It further finds that the Office did not abuse its discretion in denying his request for reconsideration.

[11] 20 C.F.R. § 10.606(b)(2).

[12] 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 9 and January 10, 2007 are affirmed.

Issued: November 19, 2007
Washington, DC

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

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

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