

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

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**C.P., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY  
DEPOT, Corpus Christi, TX, Employer**

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**Docket No. 08-185  
Issued: April 28, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 23, 2007 appellant filed a timely appeal from the June 8, 2007 decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and the October 10, 2007 decision of the Office hearing representative 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 established that he sustained an injury in the performance of duty on March 26, 2003, as alleged; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely.

**FACTUAL HISTORY**

On March 26, 2003 appellant, then a 49-year-old aircraft parts repair worker, filed a traumatic injury claim, Form CA-1, alleging that he experienced a sudden pain in his right elbow after doing a substantial amount of lifting that same day. On March 27, 2003 Michael Johnson,

appellant's supervisor, prepared a preliminary incident notification on which he stated that appellant felt pain in his right elbow while lifting case halves and compressor rotors. Appellant was instructed on proper lifting techniques, examined at the occupational health center and released to work with restricted duty. A medical officer's March 27, 2003 report indicated that appellant had a three-day limitation against pushing, pulling or lifting more than 10 pounds, repetitive use or use of vibrating hand tools with the right hand.<sup>1</sup> The officer also recommended the use of an elbow support. On April 25, 2007 the employing establishment submitted these documents to the Office along with some medical reports from 2006 and 2007.

On November 27, 2006 Dr. Thomas Alexander, a Board-certified cardiologist, evaluated appellant for chest pain and possible hypertension. He indicated that appellant had normal electrocardiogram, echocardiogram and exercise test findings. Dr. Alexander recommended that appellant stop smoking and reduce alcohol intake. A February 23, 2007 computerized tomography (CT) scan of appellant's thorax and neck revealed atherosclerotic disease of the thoracic aorta and coronary arteries and minimal pleural thickening in both sides of the chest.

On March 1, 2007 appellant was evaluated by Dr. Michael Tschickardt, a Board-certified anesthesiologist, for neck and left arm pain. Dr. Tschickardt diagnosed cervical radiculopathy in the C7 distribution and suspected disc herniation at C6. He noted that appellant had a history of chronic pain in both shoulders that had expanded to include his left upper extremity in the past two weeks. An April 3, 2007 magnetic resonance imaging (MRI) scan revealed bilateral degenerative changes in the cervical spine, with bilateral foraminal stenosis at C5-6 and C6-7. On April 9, 2007 appellant was scheduled to undergo an epidural steroid injection.

The Office notified appellant that the evidence of record was insufficient to establish his claim and requested additional factual and medical information.

On May 29, 2007 Dr. Tschickardt limited appellant to 15 pounds of lifting.

By decision dated June 8, 2007, the Office denied appellant's claim. The Office accepted that the events of March 26, 2003 occurred as alleged, but found that there was no medical diagnosis connected to the event. It found that none of the medical evidence provided a history of injury that included the 2003 employment incident or a statement alleging a relationship to appellant's employment.

On September 18, 2007 appellant requested an oral hearing.

By decision dated October 10, 2007, the Office hearing representative denied appellant's request for an oral hearing.<sup>2</sup> He noted that appellant was not entitled to an oral hearing because his request was not postmarked within 30 days of the June 8, 2007 decision. The Office hearing representative stated that he had considered the request and determined that the case could be addressed equally well by filing a request for reconsideration along with new medical evidence.

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<sup>1</sup> The name of the Officer and whether he or she was a physician could not be ascertained.

<sup>2</sup> The Board notes that, on October 10, 2007, the Office also mailed a form letter informing appellant that his request had been received and that a hearing would be scheduled if it was determined that the case was in posture.

## LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup>

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether "fact of injury" has been established. "Fact of injury" consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component of "fact of injury" is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.<sup>5</sup>

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.<sup>6</sup> To be rationalized, the opinion must be based on a complete factual and medical background of the claimant<sup>7</sup> and must be one of reasonable medical certainty,<sup>8</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup>

## ANALYSIS -- ISSUE 1

The Office has accepted that appellant was lifting case halves and compressor rotors in the performance of duty on March 26, 2003. The issue to be resolved is whether he established an injury causally related to the accepted employment incident.

On March 27, 2003 an unidentified medical officer at the employing establishment stated that appellant could not push, pull or lift more than 10 pounds, engage in repetitive actions or use vibrating hand tools with the right hand for three days. The officer recommended that appellant use an elbow support. The Board notes that the medical officer did not provide a diagnosis, objective findings or rationalized medical opinion relating to the cause of appellant's right elbow

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>6</sup> *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>7</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>8</sup> *John W. Montoya*, 54 ECAB 306 (2003).

<sup>9</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

pain. Additionally, it is unclear whether the officer was a physician. The Board has held that a report may not be considered probative medical evidence unless it can be established that the person who completed the report was a “physician” as defined by the Act.<sup>10</sup> Because it cannot be established that the May 21, 2007 report was completed by a physician, the Board finds that it does not constitute medical evidence.

The Board further finds that the remainder of the medical evidence is of little probative value to the issue of causal relationship. On November 27, 2006 more than three years after the accepted employment incident, Dr. Alexander, a Board-certified cardiologist, evaluated appellant for hypertension. He noted that appellant had normal electrocardiogram, echocardiogram and exercise test. A February 23, 2007 CT scan of appellant’s thorax and neck showed atherosclerotic disease of the thoracic aorta and coronary arteries and minimal pleural thickening in both sides of the chest. On March 1, 2007 Dr. Tschickardt, a Board-certified anesthesiologist, diagnosed cervical radiculopathy in the C7 distribution and suspected disc herniation at C6. He noted that appellant had a history of chronic pain in both shoulders, which had recently moved into the left upper extremity. An April 3, 2007 MRI scan revealed bilateral degenerative changes in the cervical spine, with bilateral foraminal stenosis at C5-6 and C6-7. On May 29, 2007 Dr. Tschickardt limited appellant to 15 pounds of lifting.

The Board notes that none of the foregoing reports references appellant’s accepted employment incident or makes any findings of causal relationship with the diagnosed conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of diminished probative value on the issue of causal relationship.<sup>11</sup> The Board finds that none of the medical reports from 2006 or 2007 establish that appellant sustained an injury in the performance of duty on March 26, 2003.

The Board therefore finds that appellant has not met his burden of proof to establish an injury under the Act.

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

Section 8124(b)(1) of the Act provides:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>12</sup>

The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.<sup>13</sup> The Office

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<sup>10</sup> *Thomas L. Agee*, 56 ECAB 465 (2005); *see also* 5 U.S.C. § 8101(2) which defines “physician” under the Act.

<sup>11</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> 20 C.F.R. § 10.616(a).

has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>14</sup> In such a case the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>15</sup>

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

Appellant made his September 18, 2007 request for an oral hearing more than 30 days after the Office's June 8, 2007 decision denying his traumatic injury claim. The Board therefore finds that he is not entitled to a hearing as a matter of right. As required by Board precedent, the Office hearing representative considered the matter and denied a discretionary hearing on the grounds that appellant could address the issues in his case through the reconsideration process. As appellant may pursue the issue in his case through this alternative review process, the Board finds that the Office did not abuse its discretion in denying his untimely request for an oral hearing.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant did not establish that he sustained an injury in the performance of duty on March 26, 2003, as alleged. The Board further finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely.

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<sup>14</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>15</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>16</sup> The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. E.g., *Jeff Micono*, 39 ECAB 617 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 10 and June 8, 2007 are affirmed.

Issued: April 28, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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