

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

R.S., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Iowa City, IA, Employer**)

**Docket No. 08-1546
Issued: December 19, 2008**

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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 5, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 5, 2008, which denied modification of a July 18, 2007 decision denying his claim for a traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof in establishing that he sustained a right shoulder injury in the performance of duty.

FACTUAL HISTORY

On June 5, 2007 appellant, then a 56-year-old maintenance mechanic, filed a Form CA-1, traumatic injury claim alleging that on February 13, 2007 he was removing a chain hoist from a trolley and injured his right shoulder. He did not stop work. Appellant's supervisor noted that he failed to timely report this shoulder injury.

By letter dated June 13, 2007, the Office noted that there was insufficient evidence to establish the claimed employment incident. It also noted that appellant did not submit medical evidence, which diagnosed a medical condition resulting from the February 13, 2007 employment incident. The Office asked appellant to submit a reasoned medical opinion from his treating physician explaining how specific work factors or incidents contributed to his claimed right shoulder injury.

Appellant submitted an April 12, 2007 report from Dr. James L. Donahue, a Board-certified internist, who treated him for right shoulder pain. He reported right shoulder pain since September 2004, with no clear injury but he claimed an exacerbation of his shoulder condition when he grabbed a hoist at work several weeks earlier. Appellant noted that he did not fill out an injury report at the time of the incident and thought it may be problematic for him to report it at this time. Dr. Donahue noted appellant's history was significant for right shoulder calcific tendinitis and mild osteoarthritis diagnosed by x-ray in September 2004. He noted right shoulder examination findings of decreased range of motion and minimally impaired rotation. Dr. Donahue diagnosed suspected moderate impingement syndrome or a possible rotator cuff tear with known osteoarthritis of the shoulder. An April 30, 2007 right shoulder magnetic resonance imaging (MRI) scan revealed a small full thickness tear of the supraspinatus, stenosing tenosynovitis of the long head of the biceps and a degenerative slap tear. Appellant submitted physical therapy notes from May 30 to June 18, 2007.

Appellant was treated by Dr. John Flint, a Board-certified internist, on May 29, 2007 for right shoulder pain and decreased range of motion. Dr. Flint noted that an old x-ray revealed osteoarthritis. He opined that this was possibly a remote injury that was reinjured when appellant grabbed a cable at work. Appellant reported pulling a chain in February 2007 and experiencing an immediate onset of right shoulder pain. Dr. Flint diagnosed right traumatic small supraspinatus tear and recommended physical therapy for six weeks. On June 19, 2007 he diagnosed right rotator cuff tear and provided work restrictions of no lifting greater than 10 pounds and no overhead activity. In a work ability note dated May 29, 2007, Dr. Flint advised that appellant could return to work with restrictions of carrying limited to 40 pounds and no use of the right arm above the shoulder.

By decision dated July 18, 2007, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained the alleged injury on February 13, 2007. It found that the initial evidence was insufficient to establish that appellant experienced the claimed incident on February 13, 2007.

On November 16, 2007 appellant requested reconsideration. He indicated that he delayed filing his claim because, when the injury occurred, he thought it was an aggravation of his existing shoulder condition and did not realize the severity of the injury or that he tore the rotator cuff. Appellant submitted a statement from George Harris, a coworker, who assisted appellant with the trolley on February 13, 2007 and noted that he informed him that he pulled a muscle in his shoulder. In another statement dated September 20, 2007, Robert L. Marshall, a coworker, noted that during the first week of February 2007 appellant complained of right shoulder pain and indicated that he injured his arm when he removed a chain hoist. In a June 22, 2007

statement, Richard C. Johns¹ of the employing establishment noted that appellant reported sustaining a right shoulder injury in February 2007, when a chain pulled on his right arm. He diagnosed right, small supraspinatus tear and opined that, based on appellant's history and absence of other trauma, the incident of February 2007, was most likely the cause of his right rotator cuff tear.

Appellant also submitted an October 10, 2006 health care provider certificate from Dr. Donahue who treated him for low back and bilateral shoulder pain. Dr. Donahue noted examination findings including bilateral shoulder pain with palpable tenderness and joint osteophytes. He advised that appellant developed a back condition in 2002 and a shoulder condition in September 2004. Dr. Donahue noted that appellant's back and shoulder episodes occurred every four to six months and lasted one to three days. He recommended physical therapy and set forth work restrictions when appellant's symptoms were active.

In a decision dated March 5, 2008, the Office denied appellant's request for modification of the prior decision. It found that the factual evidence and the medical evidence were insufficient to establish the claim.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is a federal employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation 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 is causally related to the employment injury. 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.³

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.⁴ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee

¹ It is unclear from the record whether this individual is a physician.

² *Id.*

³ *Gary J. Watling*, 52 ECAB 357 (2001).

⁴ *Michael E. Smith*, 50 ECAB 313 (1999).

must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁵

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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.⁶ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷

ANALYSIS

The Office denied appellant's claim on the grounds that he failed to establish that the events occurred as alleged. It is not disputed that appellant's duties as a maintenance mechanic involved lifting and removing chain hoists from trolleys and the use of his right shoulder. Appellant's supervisor did not dispute appellant's work duties or that he was performing his work duties on or about February 13, 2007. Appellant explained why he did not sooner file a claim and he provided a consistent history of the incident that is consistent with what was reported on medical reports including a report from Dr. Donahue dated April 12, 2007, which noted that he exacerbated his right shoulder condition when he grabbed a hoist and jerked it while working several weeks ago. Other reports from Dr. Flint from May 29, 2007 noted that appellant reinjured his right shoulder when he pulled a cable in February 2007 and had an immediate onset of right shoulder pain. Statements from appellant's coworkers also indicate that he reported the claimed injury to them contemporaneous with its occurrence. The Board finds that appellant's statements are consistent with the surrounding facts and circumstances and thus has established that he experienced the employment incident on February 13, 2007 as alleged.

The Board finds, however, that the medical evidence is insufficient to establish that appellant developed a right shoulder condition causally related to his employment duties. On June 13, 2007 the Office advised appellant of the type of medical evidence needed to establish his claim. Appellant did not submit a medical report from an attending physician addressing how specific employment factors may have caused or aggravated his claimed condition.

In his April 12, 2007 report, Dr. Donahue noted that appellant reported right shoulder pain since September 2004, with no apparent injury but noted having an exacerbation of his right shoulder condition when he grabbed a hoist and jerked it at work. Dr. Donahue noted findings and diagnosed suspected moderate impingement syndrome or a possible rotator cuff tear with

⁵ *Id.*

⁶ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

known osteoarthritis of the shoulder. However, he appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether his condition was work related.⁸ To the extent that Dr. Donahue is providing his own opinion, he failed to provide a rationalized opinion regarding the causal relationship between appellant's condition and the factors of employment believed to have caused or contributed to such condition.⁹ In an October 10, 2006 certificate of a health care provider form, Dr. Donahue noted treating appellant for low back pain in 2002 and bilateral shoulder pain in 2004 with palpable tenderness and joint osteophytes. However, this evidence is of no value in establishing the claimed traumatic injury of February 13, 2007 since it predates the time of the claimed injury.

Appellant submitted reports from Dr. Flint, dated May 29 and June 19, 2007, who treated him for right shoulder pain and decreased range of motion. He reported that he pulled a chain in February and had an immediate onset of right shoulder pain. Dr. Flint diagnosed right traumatic small supraspinatus tear. He noted appellant's history of osteoarthritis and opined that his condition was possibly a remote injury that was reinjured when appellant grabbed a cable at work. Although Dr. Flint noted that appellant's condition was "possibly" work related, he couched his opinion in speculative terms. The Board has held that medical opinions which are speculative or equivocal in character have little probative value.¹⁰ Therefore, this report is insufficient to meet appellant's burden of proof.

Appellant also submitted a statement from Mr. Johns dated June 22, 2007, who noted a history of injury and diagnosed right, small supraspinatus tear. Mr. Johns opined that, based on appellant's history and absence of other trauma, the incident of February 2007 was most likely the cause of his right rotator cuff tear. The Board notes that it is unclear from the record if Mr. Johns is a physician¹¹ and even if he is considered a physician, his opinion is speculative at best, noting that the incident of February 2007 is "most likely" the cause of appellant's right rotator cuff tear. Therefore, this report is insufficient to meet appellant's burden of proof. Likewise, notes from a physical therapist are insufficient to establish appellant's claim as a physical therapist is not a physician under the Act.¹² Therefore, these notes do not establish appellant's claim.

The remainder of the medical evidence, including an MRI scan of the right shoulder dated April 30, 2007, fails to provide an opinion on the causal relationship between appellant's

⁸ See *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

⁹ See *Jimmie H. Duckett*, *supra* note 7.

¹⁰ See *Frank Luis Rembisz*, *supra* note 8.

¹¹ See 5 U.S.C. § 8101(2). This subsection defines the term "physician." See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician). See also *D.D.*, 57 ECAB 734 (2006) (medical reports lacking proper identification cannot be considered as probative evidence in support of a claim).

¹² See *id*; *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act).

job duties and his diagnosed conditions. For this reason, this evidence is not sufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor is the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.¹³ Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office therefore properly denied his claim for compensation.

CONCLUSION

The Board therefore finds that appellant failed to establish that he developed an employment-related injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2008 and July 18, 2007 decisions of the Office of Workers' Compensation Programs are affirmed as modified.

Issued: December 19, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).