

In an August 4, 2007 work release, Theo Perkins, a physician's assistant, excused appellant from work until August 7, 2007 due to "medical illness/injury." On August 9, 2007 Dr. Kit C. McCalla, an attending osteopath specializing in orthopedic surgery, restricted appellant from work until August 13, 2007. An August 9, 2007 duty status report from Mr. Perkins diagnosed appellant with right tendinitis and impingement of the right shoulder, however, the diagnosis was not attributed to appellant's work.

The employing establishment controverted appellant's occupational disease claim.

In an August 17, 2007 duty status report, Dr. McCalla diagnosed right rotator cuff tendinitis and impingement tear. He indicated that the diagnosis was not due to the claimed injury. In an August 27, 2007 duty status report, Dr. McCalla listed the same diagnoses. He did not address whether the diagnoses were due to appellant's claimed injury. Dr. McCalla found that appellant was able to work light duty.

The Office advised appellant of the factual and medical evidence needed to establish his claim. It requested that he submit a report from an attending physician addressing causal relationship. The Office noted that the duty status reports of record did not establish that his right shoulder condition was employment related.

In a September 30, 2007 response, appellant stated that casing and delivering mail were activities contributing to his condition. He submitted an August 17, 2007 duty status report, received on October 15, 2007, containing different notations than the prior report dated August 17, 2007. This report stated "yes" to the question of whether appellant's diagnosed right rotator cuff syndrome and impingement syndrome were due to the claimed injury. Dr. McCalla advised that appellant was unable to case or sort mail. In an October 16, 2007 work release, he stated that appellant was able to resume work duties consisting of nonrepetitive one-handed work only and nonuse of the right arm or shoulder.

The Office denied appellant's claim by decision dated November 14, 2007 finding that the medical evidence was not sufficient to establish that appellant's right shoulder condition was causally related to employment factors.

In a letter dated December 13, 2007, postmarked December 19, 2007, appellant requested an oral hearing. In a February 11, 2008 decision, the Office denied appellant's request for an oral hearing as it was not timely filed. It considered appellant's request under its discretionary authority but determined that the issue in his case could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act 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 as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential

elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.¹

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.²

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. 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 appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, 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 appellant.³

ANALYSIS -- ISSUE 1

The record supports that appellant is a letter carrier who used his right arm while performing work duties such as casing and delivering mail. However, appellant has not submitted sufficient medical evidence to establish that his duties caused or aggravated a diagnosed medical condition.

Appellant submitted several form medical reports from Dr. McCalla. However, the forms do not establish a causal relationship between appellant's work activities and his right shoulder condition. The August 17, 2007 duty status report indicated "no" as to whether the diagnosis was due to the claimed injury. Although a second August 17, 2007 duty status report indicated "yes," that the right shoulder diagnosis was due to appellant's claimed injury, it is not sufficient to establish causal relationship. Dr. McCalla did not provide any medical rationale explaining how appellant's work activities caused or aggravated the diagnosed conditions.⁴ Furthermore, he did not explain the inconsistencies between the two reports dated August 17, 2007 regarding whether appellant's diagnosed conditions were due to his employment. The August 27, 2007 duty status report did not indicate whether the diagnosis was due to the claimed injury. Dr. McCalla did not provide any narrative medical report setting for a history of appellant's employment duties of casing and delivering mail. There is no report of record explaining how these duties would cause or contribute to the diagnosed right rotator cuff

¹ *J.E.*, 59 ECAB ___ (Docket No. 07-814, issued October 2, 2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

² *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor Woodhams*, 41 ECAB 345 (1989).

⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

tendinitis or impingement tear.⁵ In an August 9, 2007 work restriction form, Dr. McCalla indicated that appellant was not able to resume any work duties. The October 16, 2007 work restriction form did not address whether appellant's work duties caused or aggravated his claimed condition. These form reports provide no other information or explanation regarding the causal relationship between appellant's shoulder condition and his employment activities.

Appellant also submitted several reports from Mr. Perkins, a physician's assistant, associated with Dr. McCalla. However, a physician's assistant is not a "physician" as defined under the Act.⁶ Consequently, these reports are insufficient to establish appellant's claim.

The Board finds that appellant has not submitted sufficient medical evidence to establish a causal relationship between his work activities and his claimed right shoulder condition. Consequently, he has not met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.⁷ A claimant is not entitled to a hearing as a matter of right if the request is not made within 30 days,⁸ under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision 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.⁹ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹⁰

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹¹ The Office's procedures, which require the

⁵ *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

⁶ *J.M.*, 58 ECAB __ (Docket No. 06-2094, issued January 30, 2007) (the reports of a physician's assistant are entitled to no weight as a physician's assistant is not a physician as defined by section 8101(2) of the Act). *See* 5 U.S.C. § 8101(2).

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. § 10.616(b).

⁹ 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

¹⁰ *Teresa Valle*, 57 ECAB 542 (2006).

¹¹ *Bettye Richardson*, 59 ECAB __ (Docket No. 08-693, issued August 19, 2008); *Marilyn Wilson*, 52 ECAB 347 (2001) (the Office has discretion to grant or deny a request made after the 30-day period, and the Office will determine whether a discretionary hearing should be granted).

Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.¹²

ANALYSIS -- ISSUE 2

The Office issued its decision denying appellant's claim on November 14, 2007. Although appellant's request for an oral hearing was dated December 13, 2007, it was postmarked on December 19, 2007. The implementing federal regulations provide that the postmark date of the request determines whether the request is timely.¹³ Because the December 19, 2007 postmark on appellant's request is over 30 days after the November 14, 2007 decision, the Board finds that the Office properly denied appellant's request for a hearing as untimely filed. Appellant is not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for hearing.¹⁴

The Office exercised its discretionary authority under section 8124 in considering whether to grant a hearing. It found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.¹⁵ The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an occupational disease causally related to his federal employment. The Board also finds that the Office properly denied appellant's request for an oral hearing.

¹² *P.B.*, 59 ECAB ____ (Docket No. 08-839, issued October 15, 2008); *Teresa Valle*, 57 ECAB 542 (2006).

¹³ *Supra* note 7.

¹⁴ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹⁵ *See André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated February 11, 2008 and November 14, 2007 are affirmed.

Issued: December 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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