

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

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**N.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 07-1489  
Issued: February 26, 2008**

*Appearances:*  
*Thomas R. Uliase, 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 May 10, 2007 appellant, through his attorney, filed a timely appeal from the December 1, 2006 decision of the Office of Workers' Compensation Programs denying his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained an injury in the performance of duty on February 21, 2004, as alleged.

**FACTUAL HISTORY**

On September 28, 2004 appellant, then a 51-year-old letter technician, filed a traumatic injury claim alleging that on February 21, 2004 he fell backwards off steps and was unable to move for 10 minutes or more. He noted that a customer accompanied him. Appellant alleged that he sustained injuries to his right and left shoulder, back and legs. His supervisor responded, "I have a hard time that the carrier worked for [eight] months and suddenly decides his shoulder

hurts.” Appellant submitted a work status summary from Huntingdon Valley NovaCare, indicating that he was seen on September 28, 2004. It noted that he fell backward off steps, diagnosed strains and sprains of the rotator cuff and released him to full duty.

By letter dated October 19, 2004, the Office requested further information. Appellant responded to the Office’s questions. He noted that he reported the injury on the date it happened to his supervisor. Appellant indicated that the injury occurred when he was making a delivery to a customer and fell down steps. He applied heating pads to his shoulder for about a month. Appellant also submitted a copy of a statement on a form by the employing establishment signed by him noting an injury on February 21, 2004. However, he signed a statement saying that he did not wish to file a claim for the above injury and noted that he had three years within which to do so.

By decision dated November 24, 2004, the Office denied appellant’s claim, finding that the medical evidence did not demonstrate that the claimed medical condition was causally related to the work incident.

On December 29, 2004 appellant requested reconsideration. In a December 23, 2004 report, Dr. Edward F. Schreiber, an osteopath and medical director of NovaCare, obtained a history that on February 21, 2004 appellant fell at work striking his shoulders, leg, back and feet. He noted that appellant first came to NovaCare on September 28, 2004 and that the examination at that time showed a limited range of motion of the shoulder. Dr. Schreiber noted that a magnetic resonance imaging (MRI) scan of the left shoulder showed “tendonosis of the supraspinatus tendon as well as mild bony impingement of the supraspinatus myotendonous junction secondary to hypertrophic changes about the [acromioclavicular] joint.” He noted that appellant was currently receiving physical therapy for tendonosis and limited motion of shoulder. Dr. Schreiber stated: “It is my judgment, within reasonable medical certainty, that present shoulder pain limited motion is caused by the fall which occurred on [February 21, 2004].

In a January 11, 2005 report, Dr. Gwo-Chin Lee, an orthopedic surgeon, examined appellant and listed her impression as left frozen shoulder with impingement syndrome of left shoulder and rule out cervical radiculopathy. Appellant related that he originally injured himself while delivering mail in February 2004 and fell backwards down steps at a residence. Dr. Lee noted that an MRI scan of appellant’s left shoulder showed tendonosis over the supraspinatus infraspinatus with no evidence of tear. She noted that there was no doubt that he does have clinical findings consistent with adhesive capsulitis of the shoulder and should continue physical therapy. In a February 11, 2005 note, Dr. Lee diagnosed cervical radiculopathy adhesive capsulitis/rotator cuff syndrome.

On January 13, 2005 Dr. Schreiber noted that examination of the shoulder showed mild diffuse tenderness and a limited range of motion. He diagnosed sprain of the shoulder with tendinitis, impingement and adhesive capsulitis.

By decision dated April 28, 2005, the Office denied modification of its November 24, 2004 decision.

On June 23, 2005 appellant requested reconsideration. In a March 1, 2005 report, Dr. Lee noted that appellant's left shoulder was feeling somewhat better but stiffness and tightness continued to be significant.

In a May 24, 2005 report, Dr. Schreiber noted that he had been treating appellant for a work-related left shoulder injury since September 28, 2004. Appellant reported a work-related injury of February 21, 2004 when he fell backward off some steps injuring his left shoulder and both arms. He reported that the pain became progressively worse until he could not work. Dr. Schreiber stated:

“[Appellant] describes a work injury. This occurred on [February 21, 2004]. He presented for treatment on [September 28, 2004]. Without any other report of an injury to the left shoulder, I can only conclude that [appellant's] present adhesive capsulitis of the left shoulder is related to the fall. It is not unusual for individuals to ignore physical symptoms. For instance this is the reason why individuals are found to have a myocardial infarction months or years after the event occurred and in retrospect they recall episodes of shortness of breath and chest pain, which they write-off as cold or the flu or bronchitis or muscle strain. Certainly, diabetes is a risk factor and possible etiology for adhesive capsulitis. However, I can only base my conclusion of the etiology of this disorder to the history provided by [appellant] and to the physical examination and studies that I can obtain. As such, within reasonable medical certainty, it is my conclusion that [appellant's] current adhesive capsulitis of the shoulder is related to his work injury on [February 21, 2004].”

In a May 18, 2005 report, Dr. Schreiber noted a sprain of the shoulder with rotator cuff tendonosis and adhesive capsulitis/frozen shoulder.

By decision dated October 3, 2005, the Office denied modification of its April 28, 2005 decision.

On September 13, 2006 appellant requested reconsideration. In an August 16, 2005 note, Dr. Schreiber indicated that appellant still complained of pain and stiffness in his left arm. In a February 14, 2006 note, he indicated that he examined appellant for sprain of left shoulder with rotator cuff tendonosis and adhesive capsulitis frozen shoulder improving. Dr. Schreiber noted that at this point he had nothing further to offer appellant. He noted that appellant was improved but did need some work restrictions.

On September 29, 2006 Dr. Lee summarized treatment of appellant from January 11 to March 1, 2005. She noted that it was not unusual, especially in individuals affected with diabetes, to experience a protracted course of shoulder pain and stiffness following an injury. Dr. Lee stated that adhesive capsulitis (frozen shoulder) arose from minor trauma although in this case appellant's trauma was more substantial. Patients with diabetes suffering from a frozen shoulder oftentimes experienced an active inflammatory phase, followed by stiffness and resolution off the symptoms in a process that could take upwards of two years. Dr. Lee also noted that appellant had cervical spine disease which contributed to the pain surrounding his shoulder. She opined that appellant had partial disability stemming from pain and stiffness of his

left shoulder but that he could continue to work as a postal carrier with limitations. Dr. Lee noted that appellant has reached maximum medical improvement. She opined: “It is my opinion, within a reasonable degree of medical certainty, that [appellant’s] aforementioned conditions were the direct result of his slip and fall injury which occurred in February 2004.”

In a medical report dated January 18, 2005, Dr. Stephen J. Masceri, a Board-certified physiatrist, indicated that on that date he examined appellant who was injured at work on February 21, 2004 when he fell off a step onto his shoulders. He diagnosed: (1) persistent left shoulder and arm pain; (2) mild to moderate active C5-6 radiculopathy on the left; and (3) there is also evidence of moderate median neuropathy at the left wrist.

By decision dated December 1, 2006, the Office denied modification of the denial of appellant’s claim.

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>1</sup> has the burden of establishing 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 within the applicable time limitation period 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 are causally related to the employment injury.<sup>2</sup>

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.<sup>3</sup> Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>4</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition related to the employment incident.

An employee must submit a physician’s rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.<sup>5</sup> An award of compensation may not be based on surmise, conjecture, speculation or appellant’s belief of causal relationship.<sup>6</sup> Neither the fact that the condition became apparent during a period of employment nor

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

<sup>4</sup> *Shirley A. Temple*, 48 ECAB 404 (1997).

<sup>5</sup> *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>6</sup> *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 567 (1979).

appellant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.<sup>7</sup>

The Board has held that, when diagnostic testing is delayed, uncertainty mounts regarding the cause of the diagnosed condition and a question arises as to whether that testing in fact documents the injury claimed by the employee.<sup>8</sup> The greater the delay in testing, the greater the likelihood that an event not related to employment has caused or worsened the condition for which the employee seeks compensation. When the delay becomes so significant that it calls into question the validity of an affirmative opinion based at least in part on the testing, such delay diminishes the probative value of the opinion offered.<sup>9</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision. An employee who claims benefits under the Act has the burden of establishing the essential elements of his claim. The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment. As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.<sup>10</sup> However, it is well established that proceedings under the Act are not adversarial in nature and, while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>11</sup>

The Board notes that appellant did not file his claim for compensation until September 28, 2004, approximately seven months after the alleged incident of February 21, 2004. However, he did notify his supervisor of the injury on the date of injury. Appellant also signed a statement on the date of the injury, February 21, 2004, indicating that he did not wish to file a claim at the time of the injury and noted that he had three years to file if he chose to do so. There is no dispute that the incident occurred as alleged. The issue is whether appellant sustained an injury causally related to the February 21, 2004 employment incident.

In a note dated December 23, 2004, Dr. Schreiber detailed appellant's treatment while at NovaCare. He gave a history that appellant fell at work on February 21, 2004 striking his shoulder, leg, back and feet. Dr. Schreiber noted that an MRI scan of the left shoulder showed tendonosis of the supraspinatus tendon. He concluded that it was his "judgment within reasonable medical certainty that present shoulder pain and limited motion is caused by the fall

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<sup>7</sup> *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

<sup>8</sup> *Mary A. Ceglia*, 55 ECAB 626 (2004); *Linda L. Mendenhall*, 41 ECAB 532 (1990).

<sup>9</sup> *Id.*

<sup>10</sup> See *Virginia Richard, claiming as executrix of the estate of (Lionel F. Richard)*, 53 ECAB 430 (2002); see also *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

<sup>11</sup> *Phillip L. Barnes*, 55 ECAB 426 (2004); see also *Virginia Richard, supra* note 10; *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

which occurred [February 21, 2004].” In a May 24, 2005 report, Dr. Schreiber again opined that appellant’s adhesive capsulitis of the shoulder was related to his work injury on February 21, 2004. In a September 29, 2006 report, Dr. Lee came to the same conclusion. She summarized her treatment of appellant from January 11 to March 1, 2005. Dr. Lee discussed appellant’s MRI scan of November 11, 2004 and the electromyogram and MRI scan of January 18, 2005. She opined, within a reasonable degree of medical certainty, that appellant’s adhesive capsulitis was related to the fall injury which occurred in February 2004. Both physicians examined appellant at least seven months after the alleged incident. They referred to appellant’s MRI scan in reaching their conclusions; however, there is no copy of the MRI scan in the record. It appears that the MRI scan on which both physicians commented was obtained over eight months after appellant’s employment-related incident. The Board has held that, when diagnostic testing is delayed, there is an increased likelihood that an event not related to appellant’s employment caused or worsened the condition for which he sought compensation.<sup>12</sup> Accordingly, these reports are not sufficient to establish appellant’s claim.

The Board finds that appellant has established a *prima facie* case with respect to his claimed left shoulder condition sufficient to require development by the Office. The Board notes that the reports of the attending physicians are consistent in indicating that appellant sustained an injury to his left shoulder causally related to his federal employment. Moreover, they are not contradicted by any medical or factual evidence of record. While the reports are not sufficient to meet his burden of proof to establish the required causal relationship, they raise an uncontroverted inference between appellant’s claimed condition and the incident.<sup>13</sup> On remand, the Office should prepare a statement of accepted facts and refer appellant, along with his medical records, for a second opinion examination to obtain a rationalized opinion as to whether his current condition in his left shoulder is causally related to the February 21, 2004 employment incident, either directly or through aggravation, precipitation or acceleration. Following such further development as may be necessary, the Office shall issue an appropriate final decision on this issue in order to protect his rights of appeal.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>12</sup> *Mary A. Ceglia, supra* note 8.

<sup>13</sup> *Phillip L. Barnes, supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 1, 2006 is remanded for further consideration consistent with this opinion.

Issued: February 26, 2008  
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