

United States Department of Labor
Employees' Compensation Appeals Board

_____)	
E.M., Appellant)	
)	
and)	Docket No. 08-2350
)	Issued: August 4, 2009
DEPARTMENT OF THE AIR FORCE,)	
AIR RESERVE STATION, Niagara Falls, NY,)	
Employer)	
_____)	

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 27, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 28, 2008, 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 has established an injury in the performance of duty on August 17, 2007.

FACTUAL HISTORY

On August 31, 2007 appellant, then a 48-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that he had pain in his left shoulder and neck area from shoveling stones to fill a hole in the ground on August 17, 2007. The reverse of the claim form indicated that appellant stopped work on August 25, 2007.

The record contains a hospital form report indicating that appellant was seen at a hospital emergency room on August 27, 2007 with complaints of shoulder and neck pain. In a Form CA-16 (authorization for examination/treatment) dated September 10, 2007, Dr. Robert Bull diagnosed “likely rotator cuff” and noted that appellant had a prior rotator cuff surgical repair. He checked a box “yes” that the condition found was causally related to employment activity. Dr. Bull reported appellant was shoveling stones on August 18, 2007.

In a report dated September 19, 2007, neurologists, Drs. Ravi Pande and Edward Fine, stated that appellant started having pain on August 17, 2007 and it was aggravated enough that he presented to the emergency room on August 27, 2007. Drs. Pande and Fine diagnosed cervical myelopathy. Appellant also submitted an October 16, 2007 report from Dr. Jeffrey Chianchetti, a chiropractor, who diagnosed acute multilevel cervical intervertebral disc injuries, sprain/strains, ligamentous instability, myofascitis and radiculopathy.

Dr. Young Yu, a neurosurgeon, provided a November 5, 2007 Form CA-20 (attending physician’s report) diagnosing disc herniations at C4-5 and C5-6, with cervical disc disease at C6-7. He checked a box “yes” that the condition was employment related, stating “Immediate excruciating neck pain and left side shoulder and arm pain following the shoveling.”

By decision dated February 1, 2008, the Office denied the claim for compensation. It indicated that appellant had not established either the factual or medical aspect of the claim. On February 28, 2008 the Office received a request for reconsideration. Appellant submitted a January 22, 2008 report from Dr. Bull, who reported that appellant experienced left shoulder pain on August 17, 2007 when shoveling stones into a hole. Dr. Bull indicated that appellant underwent a left shoulder rotator cuff repair in 1993, with minimally reduced range of motion and grip strength asymmetry. He stated that appellant was working without restrictions on August 17, 2007. Dr. Bull concluded, “I feel that his current difficulties are causally related to this accident.”

By decision dated May 28, 2008, the Office reviewed the case on its merits. It indicated that appellant had established the factual aspect to the claim, but the medical evidence was insufficient to establish an injury in the performance of duty.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act provides for the payment of compensation for “the disability or death of an employee resulting from personal injury sustained while in the performance of duty.”¹ The phrase “sustained while in the performance of duty” in the Act is regarded as the equivalent of the commonly found requisite in workers’ compensation law of “arising out of an in the course of employment.”² An employee seeking benefits under the Act has the burden of establishing that he or she sustained an injury while in the performance of duty.³ In order to determine whether an employee actually sustained an injury in the

¹ 5 U.S.C. § 8102(a).

² *Valerie C. Boward*, 50 ECAB 126 (1998).

³ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

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. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.⁴

The Office’s procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.⁵ In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician’s affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.⁶

Rationalized medical opinion evidence is medical evidence that includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician’s opinion.⁷

ANALYSIS

The Office has accepted that appellant was shoveling stones on August 17, 2007. To meet his burden of proof to establish an injury causally related to the employment incident, he must submit rationalized medical evidence on the issue of causal relationship.

While Drs. Pande and Fine noted appellant’s pain complaints as of August 17, 2007 and disease of cervical myelopathy, their report did not contain a history of injury or any opinion causally relating appellant’s diagnosed condition to his alleged employment incident. With respect to a form report containing a checkmark “yes” that the condition was employment related, this does not constitute a rationalized medical opinion.⁸

As such Dr. Yu’s simple check exposure of causal relationship is of little probative value. The Board also notes that under 5 U.S.C. § 8101(2) the term “physician” ... includes

⁴ See *John J. Carlone*, 41 ECAB 354, 357 (1989).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d) (June 1995).

⁶ *Id.*

⁷ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁸ See *Barbara J. Williams*, 40 ECAB 649, 656 (1989).

chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.”⁹ Dr. Chianchetti does not diagnose a subluxation based on x-rays, therefore he is not considered a physician under the Act and his reports are of no probative value. The record also contains reports from a nurse practitioner, and this evidence is of no probative value as nurse practitioners are not physicians under the Act.¹⁰

The January 22, 2008 report from Dr. Bull provided a medical history, noting that appellant had a prior left shoulder rotator cuff injury. Dr. Bull concluded that appellant’s “current difficulties” were related to the employment incident, without further explanation. It is not clear what specific diagnosed conditions he felt were causally related to the August 17, 2007 employment incident. Dr. Bull had previously diagnosed “likely rotator cuff” in his September 10, 2007 report, and the record also contained a diagnosis of cervical disc herniations and cervical myelopathy. Moreover, he did not support his opinion with medical rationale. Dr. Bull indicated that appellant was not having symptoms prior to August 17, 2007, but that does not itself establish causal relationship. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is not sufficient, without supporting rationale, to establish causal relationship.¹¹ In the present case, the physician must provide a clear diagnosis and explain how the August 17, 2007 incident contributed to the condition.

It is appellant’s burden of proof to submit the necessary medical evidence to establish the claim. The Board finds that appellant did not meet his burden of proof in this case.¹²

CONCLUSION

The medical evidence is not sufficient to establish an injury in the performance of duty on August 17, 2007.

⁹ 5 U.S.C. § 8101(2).

¹⁰ See *Vincent Holmes*, 53 ECAB 468 (2002).

¹¹ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (because the employee is symptomatic after an injury is not sufficient to establish causal relationship without supporting rationale).

¹² The Board notes the employing establishment issued a CA-16 to appellant. A properly executed Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *Elaine M. Kreyborg*, 41 ECAB 256, 259 (1989); *Pamela A. Harmon*, 37 ECAB 263, 264-65 (1986). The Office did not address the issue in its May 28 and February 1, 2008 decisions.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 28 and February 1, 2008 are affirmed.

Issued: August 4, 2009
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