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

| | | |
|---|---|---|
| **W.G., Appellant** | ) | |
| **and** | ) | **Docket No. 09-174** |
| | ) | **Issued: July 6, 2009** |
| **U.S. POSTAL SERVICE, MIDWAY PROCESSING & DISTRIBUTION FACILITY, San Diego, CA, Employer** | ) | |

*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
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On October 22, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' September 17, 2008 decision 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 met his burden of proof in establishing that he sustained an occupational disease in the performance of duty.

### *FACTUAL HISTORY*

On November 29, 2006 appellant, then a 51-year-old custodian, filed an occupational disease claim alleging that he developed bursitis from repetitive scooping up and dumping trash cans with his right hand. He noted this was a military disability. Appellant stated that he first

realized his condition was caused or aggravated by his employment on September 8, 2006. He stopped work on September 18, 2006.[1]

Appellant submitted several work restriction notes from Dr. Thomas Martinez, a Board-certified family practitioner, dated between July 28 and August 18, 2006. Dr. Martinez noted dates that appellant was unable to work due to right shoulder pain and injury and left knee pain. He also advised when appellant could return to work and provided work limitations. On September 8, 2006 Dr. William Eves, a Board-certified orthopedic surgeon, advised that appellant work light duty between September 8 and 22, 2006 with restrictions including no pulling, pushing or lifting over 10 pounds. An undated physical therapy note diagnosed shoulder bursitis and impingement syndrome.

On January 3, 2007 the Office advised appellant of the factual and medical evidence necessary to establish his claim and allowed him 30 days to submit additional evidence. In particular, it requested a description of employment-related activities he alleged that contributed to his condition. The Office also requested a medical report with a physician's opinion on the cause of his diagnosed condition.

By decision dated July 17, 2007, the Office denied appellant's claim for compensation finding insufficient factual evidence to establish that the events occurred as alleged.

Appellant requested reconsideration on July 11, 2008. He also submitted a statement dated February 3, 2007 describing his job duties, such as sweeping and dumping trash, at the employing establishment and the frequency that he performed each duty. Appellant also indicated that his right shoulder bursitis was first diagnosed while he was in the military 10 years prior. He subsequently submitted an August 19, 2008 statement indicating that bursitis was a military service-related disability. Appellant noted that he was given zero percent disability at the time of discharge. He also described the nature of his work in the military.

In a September 8, 2006 treatment note, Dr. Eves listed appellant's complaint of right shoulder and left knee pain. X-rays revealed type II acromion with some degenerative changes in the acromioclavicular joint of appellant's shoulder and mild degenerative changes in his knee. Dr. Eves diagnosed right shoulder impingement syndrome and left knee mild arthritis. He recommended subacromial injection of the shoulder and physical therapy for the knee and shoulder. On October 29, 2007 Dr. Eves examined appellant and found irritable patellofemoral joint and significant medical joint line tenderness. He recommended testing to rule out a meniscal tear. In reports dated July 25 and August 1, 2006, Dr. Martinez diagnosed right shoulder pain and indicated that appellant could return to work. A nurse's note dated August 10, 2006 diagnosed right shoulder pain and noted that appellant was able to work. In an August 14, 2006 magnetic resonance imaging (MRI) scan report, Dr. Scott Boles, a Board-certified diagnostic radiologist, diagnosed appellant's right shoulder with sclerosis of the greater tubercle raising the question of bony impingement. Appellant also submitted physical therapy notes

[1] Form CA-2 did not indicate that appellant stopped work, but indicated that he returned to work on October 10, 2000. In a November 29, 2006 notice of proposed removal, the employing establishment indicated that appellant did not work from September 18 to October 8, 2006 and intermittent dates thereafter. Appellant was removed from his position with the employing establishment on December 31, 2006.

dated November 19, 1992 diagnosing left neck muscular symptoms and right shoulder tendinitis and bursitis.

In a September 11, 2008 report, Dr. Eves stated that appellant's "shoulder injury of September 2006 does appear to be connected to work activities he was doing at that time."

By decision dated September 17, 2008, the Office modified its July 17, 2007 decision finding that appellant's work factors occurred as alleged. However, it also found that the medical evidence was insufficient to establish a causal relationship between the work factors and the claimed condition.

## ***LEGAL PRECEDENT***

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.[2]

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.[3]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[4]

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

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

[4] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

## ***ANALYSIS***

The record reflects that appellant's employment activities require repetitive scooping up and dumping trash cans with his right arm. However, the medical evidence does not support that these repetitive duties caused or aggravated appellant's bursitis.

Appellant submitted a report from Dr. Eves dated September 11, 2008 in which Dr. Eves indicated that appellant's shoulder injury of September 2006 "does appear" to be connected to the work activities he was performing at the time. However, Dr. Eves' report is speculative as his use of the phrase "does appear" makes his opinion on causal relationship equivocal.[5] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, neither can such opinion be speculative or equivocal. The opinion should be one of reasonable medical certainty and must be supported by medical rationale.[6] Dr. Eves did not provide an unequivocal opinion explaining how particular work duties caused or aggravated a diagnosed medical condition nor did he explain why appellant's symptoms and condition would not be due solely to his preexisting right shoulder condition. Additionally, his other reports are insufficient to support appellant's claim as they only diagnosed right shoulder impingement and left knee mild arthritis without providing an opinion on causal relationship. The Board has held that 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.[7]

Likewise, Dr. Martinez's work restriction notes and reports set forth appellant's status and indicated that he was unable to work due to right shoulder and left knee pain. However, none of the medical evidence from Dr. Martinez specifically addressed the cause of the diagnosed condition or related it to appellant's employment activities. As noted, medical evidence without an opinion on causal relationship lacks probative value. Furthermore, the Board has held that a diagnosis of pain does not constitute the basis for the payment of compensation.[8] Similarly, Dr. Boles' report of diagnostic testing also did not provide any opinion on whether appellant's job duties caused or aggravated his diagnosed condition and, therefore, his report is of little probative value.

The record also contains several physical therapy notes. However, reports from physical therapists are of no probative value as physical therapists are not considered physicians under the Act, and as a result, they are not competent to provide a medical opinion.[9] Likewise, the nurse's notes of record do not sufficiently support appellant's claim as registered nurses and licensed

[5] *See Lowell Spicer*, 39 ECAB 1017 (1988) (where the Board held that a physician's report was speculative by stating that it "appeared" that appellant's leg condition was related to the bump on his calf).

[6] *Norman E. Underwood*, 43 ECAB 719 (1992).

[7] *K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007).

[8] *See C.F.*, 60 ECAB __ (Docket No. 08-1102, issued October 10, 2008) (pain is a symptom, not a compensable medical diagnosis); *Robert Broome*, 55 ECAB 339, 342 (2004).

[9] *Barbara Williams*, 40 ECAB 649 (1989).

practical nurses are not "physicians" as defined under the Act. Their opinions are of no probative value.[10]

Consequently, the medical evidence is insufficient to establish that appellant sustained an occupational disease causally related to his employment activities.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof in establishing that he sustained an occupational disease in the performance of duty.[11]

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated September 17, 2008 is affirmed.

Issued: July 6, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[10] *Roy L. Humphrey*, 57 ECAB 238 (2005); *see* 5 U.S.C. § 8101(2) (defining the term "physician"); *see also Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician).

[11] Appellant submitted new evidence on appeal. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. 20 C.F.R. § 501.2(c).