United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 08-2434**
	)	**Issued: June 12, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Murfreesboro, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 10, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated June 20, 2008, denying his claim for compensation and an August 8, 2008 decision, denying his request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a traumatic injury on April 8, 2008; and (2) whether the Office properly denied appellant's request for reconsideration without further merit review.

FACTUAL HISTORY

On April 29, 2008 appellant, then a 52-year-old housekeeping aid, filed a traumatic injury claim alleging that on April 8, 2008 he injured his left shoulder taking trash out of large containers. He did not stop work.

In an April 29, 2008 magnetic resonance imaging (MRI) scan report, Dr. Iantha L. Harney, a Board-certified diagnostic radiologist, noted appellant's left shoulder pain and reduced range of motion from a pulling injury. She diagnosed severe tendinopathy of the supraspinatus and infraspinatus tendons with a full thickness tear of the supraspinatus across its entire width. Dr. Harney also diagnosed longitudinal partial thickness tearing of the infraspinatus at the myotendinous junction. She found a torn anterior inferior labrum, degenerative blunting of the posterior labrum and suspected focal tear of the posterior inferior labrum.

In an April 9, 2008 emergency room report, a registered nurse noted appellant's complaint of left shoulder pain, particularly when lifting his arm. The nurse indicated that appellant had been lifting heavy trash the previous night. In a report of the same date, Dr. Naeem Uddin, a Board-certified family practitioner, noted that appellant had right shoulder pain due to overuse with pain worsening with movement. He reported that appellant denied any trauma. Dr. Uddin diagnosed synovitis and tendinitis due to overuse.

In a hospital report dated April 17, 2008, a registered nurse noted examination findings and appellant's complaint of left shoulder pain after lifting a trash bag out of a trash can four days prior. On April 17, 2008 Dr. David Lin, a Board-certified diagnostic radiologist, noted that appellant was lifting when he heard a popping sound in his left shoulder. He indicated that views of appellant's left shoulder revealed no fractures or dislocations and the rotator cuff space appeared maintained.

In progress notes dated April 28, 2008, Linda Layhl, a nurse practitioner with the employing establishment, noted that appellant was unable to tolerate an MRI scan due to shoulder pain. On April 29, 2008 she noted that the MRI scan results revealed tears to the tendons in appellant's shoulder.[1] In work restriction forms dated between April 21 and 30, 2008, Ms. Layhl advised limited duty with no use of the left arm. On May 6, 2008 appellant sought Office authorization for left shoulder surgery.

On May 12, 2008 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 an April 30, 2008 report, Dr. Charles Kaelin, a Board-certified orthopedic surgeon, noted that on April 9, 2008 appellant had picked up a large, heavy trash can and felt immediate pain in his left shoulder. He noted that appellant had no previous history of shoulder problems. Upon examination, Dr. Kaelin found that the left upper extremity was neurovascularly intact. He found that appellant was unable to abduct or forward flex beyond 30 to 35 degrees. Dr. Kaelin reviewed the MRI scan results and diagnosed moderate left shoulder degenerative changes in the

[1] An illegible signature also appears under Ms. Layhl's signature on these progress notes.

acromioclavicular joint and a "re-tear" of the rotator cuff. He recommended surgery. Dr. Kaelin also provided an April 30, 2008 physical therapy referral.

By decision dated June 20, 2008, the Office denied appellant's claim finding that he did not establish that the claimed medical condition was related to the April 8, 2008 incident.

Appellant subsequently submitted April 28 and 29, 2008 progress notes from Ms. Layhl that were already of record. In a June 23, 2008 note, Ms. Layhl indicated that appellant was awaiting approval for surgery and that he continued to use a sling for his left shoulder. On July 16, 2008 appellant requested reconsideration.

By decision dated August 8, 2008, the Office denied appellant's request for reconsideration without a merit review. It found that the evidence submitted in support of the reconsideration request was cumulative and repetitious.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 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.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[4]

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

[2] 5 U.S.C. §§ 8101-8193.

[3] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *Id*.

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.[5]

ANALYSIS -- ISSUE 1

The record reflects that appellant was lifting a trash container on April 8, 2008. However, the medical evidence does not establish that lifting a trash container caused or aggravated his claimed left shoulder injury.

On April 30, 2008 Dr. Kaelin noted that appellant picked up a heavy trash can and felt pain in his left shoulder. He diagnosed degenerative changes in the acromioclavicular joint and re-tear of the rotator cuff of the left shoulder. However, Dr. Kaelin appears to be noting the history provided by appellant instead of providing his own opinion on causal relationship. To the extent that he supported causal relationship, he did not provide medical rationale[6] explaining how lifting a trash can caused or aggravated appellant's diagnosed condition. Dr. Kaelin also did not explain the apparent discrepancy in his report, where he advised that appellant had no prior shoulder problems but where he also diagnosed a "re-tear" of the rotator cuff, which is suggestive of a preexisting left shoulder condition. Therefore, Dr. Kaelin's opinion is insufficient to establish appellant's claim.

On April 9, 2008 Dr. Uddin indicated that appellant had right shoulder pain but did not sustain any trauma. He diagnosed synovitis and tendinitis from overuse. However, Dr. Uddin did not address causal relationship between the April 8, 2008 lifting incident and the claimed left shoulder condition. 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] Thus, this report is insufficient to establish appellant's claim.

Similarly, reports of diagnostic testing are insufficient to establish appellant's claim. In an April 17, 2008 x-ray report, Dr. Lin noted that appellant heard a popping sound in his left shoulder while he was lifting. However, he provided no opinion on whether the lifting incident caused any diagnosed condition. As well, Dr. Harney did not specifically address whether the act of lifting trash cans on April 8, 2008 caused or aggravated a diagnosed condition. As noted, medical evidence without an opinion on causal relationship is of limited probative value.

The record also contains several reports from nurses. However, nurses are not "physicians" as defined under the Act and therefore their opinions are of no probative value.[8]

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

[6] *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).

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

[8] *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).

Consequently, the medical evidence is insufficient to establish that appellant sustained a compensable injury on April 8, 2008.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

ANALYSIS -- ISSUE 2

In reconsideration request appellant did not assert that the Office erroneously applied or interpreted a specific point of law and he did not advance a relevant legal argument not previously considered by the Office.

Although appellant submitted progress notes from a nurse with his reconsideration request, these documents do not constitute relevant and pertinent new evidence not previously considered by the Office. In particular, his progress notes dated April 28 and 29, 2008 from Ms. Layhl were already of record and had been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11] Appellant also submitted a new June 23, 2008 progress note from Ms. Layhl who noted appellant's status. However, the underlying issue is medical in nature, namely whether appellant established that he sustained an injury causally related to his employment on April 8, 2008. Although the June 23, 2008 progress note was new, it is not relevant as it cannot be considered medical evidence as it was signed by a nurse.[12] Therefore, this report does not constitute relevant or pertinent evidence.

Consequently, the Office properly denied appellant's request for reconsideration without a merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that he sustained a traumatic injury on April 8, 2008 in the performance of duty. The Board also finds that the Office properly denied appellant's request for reconsideration without a merit review.

[9] *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[10] *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

[11] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007).

[12] *See supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 8 and June 20, 2008 are affirmed.

Issued: June 12, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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