United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 09-50**
	)	**Issued: March 6, 2009**
U.S. POSTAL SERVICE, PITTSFORD POST OFFICE, Pittsford, NY, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 6, 2008 appellant filed a timely appeal from the November 13, 2007 and January 3, 2008 merit decisions of the Office of Workers' Compensation Programs, denying his claim for fact of injury, and a February 7, 2008 nonmerit decision, denying his request for reconsideration of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that he sustained a left shoulder, left arm and neck injury in the performance of duty; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 20, 2007 appellant, then a 40-year-old postal clerk, filed a traumatic injury claim (Form CA-1) alleging that, on September 17, 2007, while breaking down flats, he experienced severe left shoulder, left arm and neck pain and loss of strength in his left arm. He

claimed the pain felt like a strained muscle. Appellant stopped work on September 19, 2007 and did not return.

In a letter dated October 12, 2007, the Office notified appellant of the deficiencies in his claim and requested additional information.

Appellant subsequently submitted handwritten medical notes dated September 18 and October 3, 2007 with an illegible signature, an October 19, 2007 medical report signed by a nurse and an October 3, 2007 x-ray report diagnosing C4-5 disc space narrowing in the cervical spine. The September 18, 2007 medical note diagnosed neuritis or muscle spasm and strain, indicating that the injury was related to lifting heavy bundles at work and pushing cages.

By letter dated October 1, 2007, the employing establishment controverted appellant's claim, contending that he did not notify management of an injury on September 17, 2007. The employing establishment further stated that he showed up for work on September 18, 2007, however he left early.

On October 2, 2007 appellant contacted the employing establishment by telephone. In a handwritten telephone message, he was recorded as stating that he first noticed pain on September 17, 2007 while sorting mail. Appellant worked until September 19, 2007, when he woke up and could barely move his left arm.

In a decision dated November 13, 2007, the Office denied appellant's claim on the grounds that he did not establish that the alleged incident occurred at the time, place and in the manner alleged.

On December 7, 2007 appellant filed a request for reconsideration. On November 28, 2007 he alleged that he was unable to return to work due to numbness running from the left side of his neck down to his left arm. Appellant also provided two prescriptions for physical therapy dated September 19 and October 22, 2007 and physical therapy progress notes dated September 27 through November 28, 2007.

By decision dated January 3, 2008, the Office denied modification of the November 13, 2007 decision, finding that appellant did not submit factual or medical evidence sufficient to remedy the defects in his claim.

In a November 26, 2007 medical report, a Dr. Lon Baratz stated that on September 19, 2007 appellant presented with a two-week history of left neck stiffness radiating into his left shoulder and left arm and associated weakness in the left arm with occasional numbness and tingling. Physical examination revealed initial tenderness in the left, mid-back and trapezius muscles and associated tingling of the left arm with head movement. Dr. Baratz noted that appellant remained totally disabled from his job since September 19, 2007 and opined that his injury was a direct result of lifting heavy bundles of magazines and pushing and pulling cages filled with magazines and mail at work.

On January 22, 2008 appellant requested reconsideration. He submitted a duplicate copy of the October 3, 2007 x-ray report and a series of handwritten medical notes with an illegible signature dated September 18 through December 11, 2007. Appellant also provided a

November 26, 2007 certification of health care provider signed by Dr. Baratz, who indicated that appellant sustained a serious health condition. Dr. Baratz stated that in September 2007 appellant began experiencing left neck and upper back pain with numbness and weakness of the left arm, which interfered with his ability to function at work for approximately three to four months.

By decision dated February 7, 2008, the Office denied further merit review on the grounds that appellant did not indicate the basis for his reconsideration request and that the evidence was submitted prior to his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,[2] including that he is an "employee" within the meaning of the Act[3] and that a claim was filed within the applicable time limitation.[4] The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.[5]

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 or she actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] An employee has not met his or her burden of proof in establishing the occurrence of

---

[1] 5 U.S.C. §§ 8101-8193.

[2] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[3] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[4] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[5] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[7] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[8] *M.H.*, *supra* note 3; *George W. Glavis*, 5 ECAB 363, 365 (1953).

an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[10] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11]

ANALYSIS -- ISSUE 1

The issue is whether appellant established that he sustained a neck and left shoulder and arm injury on September 17, 2007 while breaking down flats at work. In the November 13, 2007 and January 3, 2008 decisions, the Office found that appellant did not establish that the incident occurred at the time, place and in the manner alleged.

Appellant alleged that on September 17, 2007 he experienced left shoulder, left arm and neck pain, similar to that of a muscle strain, while breaking down flats at work. The employing establishment noted that he did attend work the next day, however he left early. Medical records support that appellant sought medical treatment the day after his injury, September 18, 2007, presenting left shoulder pain, left arm and neck pain related to his employment at the employing establishment, including lifting bundles of magazines and pushing and pulling cages. Appellant timely notified the employing establishment of his injury and filed a claim on September 20, 2007, only three days after the incident.

The Board finds that the record does not contain inconsistencies such as to cast serious doubt on the validity of appellant's claim. Appellant only worked one day after the incident, at which time he left early and did not return. He gave timely notification of his injury to the employing establishment, filing his claim within three days of the incident. Further, appellant sought contemporaneous medical treatment the day after the alleged incident and the medical record generally support's his claim that he injured his left shoulder, arm and neck at work.[12]

The Board finds that the factual evidence supports that the September 17, 2007 incident occurred as alleged. However, the medical evidence is insufficient to establish that appellant sustained an injury related to the accepted incident.

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical

[9] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

[10] *M.H., supra* note 3; *John D. Shreve*, 6 ECAB 718, 719 (1954).

[11] *S.P., supra* note 9; *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

[12] *Cf. M.H., supra* note 3, (where the Board accepted that appellant established that the incident occurred as alleged, despite the fact that she neglected to respond to the Office's initial development letter requesting information as to the circumstances of the alleged incident. Here, appellant sought medical attention within two days, did not continue to work after the incident, filed her claim within five days and the record did not contain any inconsistencies as to the factual circumstances of the incident.).

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.[13]

The only medical evidence of record addressing the cause of appellant's injury is a handwritten medical note dated September 18, 2007, with an illegible signature. A report may not be considered probative medical evidence unless it can be established that the person completing the report is a physician as defined in 5 U.S.C. § 8101(2).[14] Thus, the Board finds that this note is insufficient to establish causation as there is no indication that the note was completed by a physician.

The Board finds that the factual evidence was sufficient to establish that the September 17, 2007 incident occurred as alleged. However, the medical evidence fails to establish that appellant sustained a left shoulder, left arm or neck injury causally related to the accepted incident.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act[15] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[16] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[17]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[18] its 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.[19] To be entitled to a merit

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

[14] 5 U.S.C. § 8101(2) defines physicians as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See Merton J. Sills*, 39 ECAB 572 (1988).

[15] 5 U.S.C. §§ 8101-8193.

[16] *Id.* at § 8128(a).

[17] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[18] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.606(b)(2).

review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[20] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[21]

ANALYSIS -- ISSUE 2

The issue is whether the Office properly denied further merit review of appellant's claim. The Board finds that the Office improperly denied merit review.

Subsequent to the last merit decision on January 3, 2008, appellant submitted a November 26, 2007 medical report signed by Dr. Baratz who described the history and treatment for appellant's neck and left shoulder and arm injury, opining that his condition was a direct result of lifting heavy bundles of magazines and pushing and pulling cages filled with magazines and mail at work. Appellant also submitted a November 26, 2007 certification of healthcare provider, signed by Dr. Baratz, who stated that appellant sustained a neck and back injury, interfering with his ability to work. The Board finds that these documents constitute new evidence, pertinent to the issue of whether appellant sustained an injury in the performance of duty, and entitling him for further merit review. Accordingly, the Office should have reviewed appellant's case on the merits and discussed this relevant and pertinent new evidence.[22]

CONCLUSION

The Board finds that appellant failed to establish that he sustained a left shoulder, left arm and neck injury in the performance of duty. While the evidence is sufficient to establish that the September 17, 2007 incident occurred as alleged, no physician has provided a well-reasoned explanation of how this incident caused or contributed to an injury. Further, the Board finds that the Office improperly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[20] *Id.* at § 10.607(a).

[21] *Id.* at § 10.608(b).

[22] *See* 5 U.S.C. § 8128(a). *See also Bill B. Scoles*, 57 ECAB 258 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2008 and November 13, 2007 merit decisions of the Office of Workers' Compensation Programs are affirmed, as modified. Further, a February 7, 2008 decision of the Office is set aside. The case is remanded for further consideration consistent with this opinion.

Issued: March 6, 2009
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