United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 08-2145**
	)	**Issued: May 12, 2009**
DEPARTMENT OF THE NAVY, MARINE BASE, Camp Lejeune, NC, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2008 appellant filed a timely appeal from decisions of the Office of Workers Compensation Programs' dated December 21, 2007 and July 9, 2008. Under 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 sustained left shoulder and neck injuries in the performance of duty on February 23, 2007; and (2) whether appellant sustained a left ear injury on February 23, 2007 causing a ratable hearing loss causally related to factors of her federal employment.

FACTUAL HISTORY

Appellant, a 47-year-old transportation clerk, filed a traumatic injury claim on February 23, 2007, alleging that she injured her left shoulder, neck and ear while holding a telephone and writing on a folder.

On March 23, 2007 the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. It asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition and an opinion as to whether her claimed condition was causally related to her federal employment. The Office requested that appellant submit the additional evidence within 30 days.

Appellant submitted several treatment notes from the employing establishment's health unit from February through April 2007, which indicated that she received treatment for her neck and left shoulder, but did not submit any comprehensive reports from a physician. A March 28, 2007 clinic note restricted her from computer work or telephone work until she had a headset installed and restricted her from overhead work and lifting exceeding five pounds.

By decision dated April 25, 2007, the Office denied appellant's claim, finding that she failed to submit sufficient medical evidence in support of her claim that she sustained left shoulder, ear and neck injuries in the performance of duty on February 23, 2007.

On May 18, 2007 appellant requested a review of the written record.

By decision dated October 22, 2007, an Office hearing representative set aside the April 25, 2007 decision and remanded for further development of the medical evidence.[1]

In a report dated December 6, 2007, Dr. Noel Rogers, Board-certified in orthopedic surgery, related that appellant injured her left shoulder on February 23, 2007 and underwent left shoulder arthroscopic surgery on June 8, 2007. He noted that appellant believed that the surgery helped her but she was still experiencing pain in her left shoulder. Appellant was able to move her shoulder but was having trouble reaching overhead and holding her arm up for extended periods of time. Dr. Rogers related that appellant stated that her neck did not really bother her; she only had residual symptoms in her shoulder and none in her neck. On examination, appellant had no neck tenderness and full range of motion. Dr. Rogers advised that x-rays of the left shoulder shows some mild acromioclavicular (AC) arthritis, with no other real changes. He diagnosed cervical strain, resolved; mild AC arthritis by x-rays; status post-subacromial depression, rotator cuff repair.

Dr. Rogers stated that appellant's February 23, 2007 work incident might have caused a neck problem; however, if she did have such a problem it had resolved since she did not complain of neck pain. He dismissed the possibility that she had any preexisting degenerative changes in the shoulder, which were mild and located only in the AC joint. With regard to whether appellant's left shoulder condition was causally related to the February 23, 2007 work incident, Dr. Rogers indicated that he found it difficult to attribute shoulder impingement and a rotator cuff tear to holding a telephone to her ear while writing on a folder.

[1] The Board notes that the hearing representative found that appellant had established fact of injury, which it stated was contrary to the Office's April 25, 2007 determination. This constituted error, as the April 25, 2007 decision denied appellant's claim on the grounds that she failed to submit sufficient medical evidence, not that she had failed to establish fact of injury; the decision clearly accepted that she had experienced an incident at work on February 23, 2007, as she had alleged. Nonetheless, any error is harmless as appellant was permitted to submit additional medical evidence in support of her claim.

In a December 14, 2007 report, Dr. Charles Beasley, Board-certified in otolaryngology, stated:

> "[Appellant] states that on February 23, 2007 she heard a pop in the left side of her neck or shoulder or ear when she was talking on the telephone. She state[d] that she had noted [that] her hearing was down in the left ear. [Appellant] state[d] [that] she had no hearing test done before February 2007.
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> "Examination today shows the external ear to be normal. The ear canals are normal. The tympanic membranes are normal. Audiogram reveals speech recognition threshold (SRT) of 20 [decibel] (dB) in the right ear and 15 dB in the left ear with 100 percent speech discrimination bilaterally. The tympanogram is normal bilaterally. The pure bone thresholds are not felt to be reliable and it was felt the patient was malingering during the pure tone threshold testing.… [A]nd [otoacoustic emission] (OAE) [test] was performed revealing normal OAE in the SRT from 2,000 to 3,000 [hertz] (Hz). The OAE was absent from 4,000 to 6,000 Hz indicating a possible high frequency, bilateral, sensorineural hearing loss.
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> "It is my opinion that there was no evidence for injury to the left ear on February 23, 2007. Patient's hearing is normal in the speech frequency. It is possible she has a high frequency, bilateral, hearing loss due to unrelated causes."

By decision dated December 21, 2007, the Office denied appellant's claim that she sustained left shoulder, ear and neck injuries in the performance of duty on February 23, 2007. It found that the opinions of Drs. Rogers and Beasley represented the weight of the medical evidence.

On January 10, 2008 appellant requested an oral hearing, which was held on May 7, 2008.

Appellant submitted: (1) a March 29, 2007 radiology report, which indicated degenerative joint disease in her left AC joint; (2) reports dated May 2, 14 and 25, 2007 from a physician's assistant, Richard Ulstad; and (3) reports dated May 30 and August 15, 2007 from Dr. Robert Boswell, Board-certified in internal medicine; a May 16, 2007 magnetic resonance imaging (MRI) scan report, which showed rotator cuff tendinopathy, full thickness tear involving the supraspinatus tendon, suspect small anterior labral tear of the left shoulder and degenerative changes of the AC joint; Dr. Boswell's June 8, 2007 operative report and a September 26, 2007 note from Dr. Boswell releasing appellant to return to light duty, with restrictions on overhead reaching and lifting more than five pounds.

In his May 2, 2007 report, Mr. Ulstad, a physician's assistant, noted the history of injury and related that appellant had limited range of motion in her left shoulder with no numbness or tingling; she experienced difficulty sleeping on her left shoulder. He advised that x-rays indicated a type two acromion, osteopenia and minimal degenerative changes, with no acute fracture or mal-alignment. Mr. Ulstad related continued left shoulder pain in appellant's May 14, 2007 report and scheduled her for an MRI scan. In his May 25, 2007 report, he stated that the MRI scan showed labral changes in the anterior labrum with a mild tear in addition to

changes at the supraspinatus insertion with probable full thickness rotator cuff tear with increased signal.

In his May 30, 2007 report, Dr. Boswell related findings of left shoulder pain on examination and related that appellant experienced increased pain with activity. In his report dated August 15, 2007, he noted that she was about nine weeks removed from left shoulder arthroscopy and advised that her condition had improved, though it had not reached 100 percent. Dr. Boswell stated that appellant could return to light duty on approximately September 1, 2007.

By decision dated July 9, 2008, an Office hearing representative affirmed the December 21, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing that 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 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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.[5] 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.[6] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.[7]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

[7] *Id.*

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[8]

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.[9] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

ANALYSIS -- ISSUE 1

The Office accepted that appellant experienced left shoulder and neck pain while holding a telephone and writing on a folder on February 23, 2007. The question of whether an employment incident caused a personal injury can only be established by probative medical evidence.[10] Appellant has not submitted rationalized, probative medical evidence to establish that the February 23, 2007 employment incident caused a personal injury and that the work accident would have been competent to cause the claimed injury.

The Board notes initially that appellant submitted several reports from Mr. Ulstad, a physicians' assistant. Reports from a physician's assistant are not considered medical evidence as a physician's assistant is not considered a physician under the Act.[11]

Drs. Boswell and Rogers stated findings on examination and indicated that appellant had a torn left rotator cuff, torn left labrum, left shoulder impingement and degenerative joint disease in the left AC joint based on the results of diagnostic tests. These reports, however, did not relate the diagnoses to the February 23, 2007 incident at work. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[12] Dr. Boswell diagnosed left rotator cuff tear by MRI scan and performed arthroscopic surgery to ameliorate this condition on June 8, 2007. He stated in his August 15, 2007 report that appellant's condition had improved, though she was not yet fully recovered. Dr. Boswell released her to return to light duty with restrictions in September 2007. Dr. Rogers indicated in his December 6, 2007 report, that he found it hard to attribute shoulder impingement and a rotator cuff tear to the February 23, 2007 work incident, in which appellant held a telephone to her ear and was writing on a folder. He too believed that the June 8, 2007 left shoulder arthroscopic surgery improved her condition although he noted that appellant still had some left shoulder pain. Dr. Rogers related that she was able to move her shoulder but was

[8] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[9] *Id.*

[10] *John J. Carlone*, *supra* note 5.

[11] *Ricky S. Storms*, 52 ECAB 349 (2001).

[12] *See Anna C. Leanza*, 48 ECAB 115 (1996).

having trouble reaching overhead and holding her arm up for extended periods of time. He related that appellant stated that her neck did not really bother her; she only had residual symptoms in her shoulder and none in her neck. Dr. Rogers dismissed the possibility that she had any preexisting degenerative changes in the shoulder, which were mild and located only in the AC joint. None of these physicians considered appellant's neck condition to be a serious problem. Appellant only had some slight residual symptoms and minimal complaints regarding her neck, with no neck tenderness and full range of motion on examination. Dr. Rogers stated that if she did have a neck condition, it had resolved.

Although these physicians presented diagnoses of appellant's condition, they did not adequately address how these conditions were causally related to the February 23, 2007 work incident. The medical reports of record did not explain how medically appellant would have sustained left shoulder or neck injuries because she was holding a telephone to her ear while writing on a folder. There is insufficient rationalized evidence in the record that appellant's left shoulder or neck injuries were work related. Appellant failed to provide a rationalized, probative medical opinion relating her current condition to any factors of her employment. Therefore, she failed to provide a medical report from a physician that explains how the work incident of February 23, 2007 caused or contributed to the claimed left shoulder and neck injuries.

The Office advised appellant of the evidence required to establish her claim; however, she failed to submit such evidence. Appellant did not provide a medical opinion which describes or explains the medical process through which the February 23, 2007 work accident would have caused the claimed injury. Accordingly, she did not establish that she sustained an injury in the performance of duty. The Office properly denied appellant's claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Under section 8107 of the Act[13] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluation of schedule losses.[14]

It is the claimant's burden to establish that he or she has sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[15] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the

[13] 5 U.S.C. § 8107.

[14] A.M.A. *Guides*, (5th ed. 2001); *Joseph Lawrence, Jr.* 53 ECAB 331 (2002).

[15] *Tammy L. Meehan*, 53 ECAB 229 (2001).

impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A. *Guides*.[16]

ANALYSIS -- ISSUE 2

The Board finds that appellant failed to submit the medical opinion evidence necessary to establish that she sustained a permanent impairment and ratable hearing loss caused by the February 23, 2007 work incident.

In this case, the Office accepted that appellant experienced pain in her left ear as a result of an incident at work on February 23, 2007. Appellant's claim was denied as she did not establish that she sustained a permanent impairment as a result of this incident.

The only medical report appellant submitted was the December 14, 2007 report from Dr. Beasley, which stated the history of injury and had appellant undergo an audiogram. This report, however, did not contain a diagnosis relating to the February 23, 2007 incident at work. This report also does not provide the necessary evidence to support appellant's claim because it does not provide any findings pertinent to a permanent impairment. Even in a claim for hearing loss it remains her burden to submit some evidence in support of a permanent impairment. Although appellant alleged that she sustained a hearing loss due to holding a telephone while writing on a folder, she did not submit medical evidence sufficient to show that she had any measurable permanent impairment, that she had reached maximum medical improvement or that she had a ratable hearing loss causally related to the February 23, 2007 work incident. Dr. Beasley stated that there was no evidence for injury to the left ear on February 23, 2007 and advised that appellant's hearing was normal in the speech frequency. He stated that it was possible that she had a high frequency, bilateral, sensorineural hearing loss, but that this would be due to unrelated causes. Dr. Beasley's report indicates that appellant has no hearing loss and thus no permanent impairment.

The Office advised appellant of the evidence required to establish her claim; however, she failed to submit such evidence. Appellant did not provide a medical opinion which describes or explains the permanent impairment caused by the February 23, 2007 work incident. Accordingly, she did not establish that she sustained a ratable hearing loss in the performance of duty.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained neck and left shoulder injuries in the performance of duty. The Board finds that she has failed to establish that she sustained permanent impairment causing a ratable hearing loss in the performance of duty.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2008 and December 21, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 12, 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