United States Department of Labor
Employees' Compensation Appeals Board

G.J., Appellant	)	
and	)	**Docket No. 09-488**
	)	**Issued: September 8, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 9, 2008 appellant filed a timely appeal from a September 9, 2008 nonmerit decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review that denied his request for an oral hearing as untimely. The Board also has jurisdiction over the February 20, 2008 merit decision of the Office that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on December 6, 2007; and (2) whether the Office properly denied his request for an oral hearing as untimely.

FACTUAL HISTORY

On January 2, 2008 appellant, a 55-year-old limited city carrier, filed a traumatic injury claim (Form CA-1) for back and neck injuries. He attributed his injuries to a December 6, 2007

incident when, after returning to the workroom floor after a break, he experienced pain and fell to the floor.[1]

Appellant submitted a December 6, 2007 UMB Medical Center West emergency nursing record, which indicated that he was examined on that day for neck spasms.

On December 6, 2007 Dr. Keith Chesser, a radiologist, reported that lateral and swimmers views of appellant's cervical spine revealed no definite evidence of fracture or listhesis. A December 6, 2007 report from Dr. David P. Denney, Board-certified in emergency medicine, reported that x-rays of the cervical spine revealed a fusion of the vertebral bodies C4-6 and spondylosis at the C3-4 and C6-7 levels. Dr. Denney noted degenerative changes with multilevel foraminal stenosis and reversal of lordosis with otherwise normal alignment. There was no definitive evidence of fracture or suspicious listhesis. Dr. Denney also noted ossification of the stylohyoid ligaments.

In a December 6, 2007 note, Dr. Denney diagnosed acute chronic neck pain and reported that appellant could return to work on December 7, 2007.

By decision dated February 20, 2008, the Office denied appellant's claim because the evidence of record was insufficient to establish that appellant's alleged medical condition was related to the established employment event.

By request postmarked April 25, 2008, appellant requested an oral hearing. He continued to submit medical evidence.

By decision dated September 9, 2008, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. The Office exercised its discretion and advised him that his claim could be equally well addressed by requesting reconsideration and submitting additional evidence or, in the alternative, by appealing to the Board.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of appellant's claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4] As part of his burden, the employee must submit rationalized medical

[1] The Office issued a Form CA-16. A properly executed Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. *See Elaine M. Kreymborg*, 41 ECAB 256, 259 (1989). The CA-16 form issued to appellant authorized examination and necessary conservative treatment and was therefore properly executed.

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

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

opinion evidence based on a complete factual and medical background showing causal relationship.[5] 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.[6]

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.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

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.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained back and neck injuries in the performance of duty that he attributed to a December 6, 2007 employment incident when he fell on a workroom floor. His burden was to establish, through production of probative medical evidence, that his back and neck injuries were causally related to the December 6, 2007 employment incident. The Board finds the medical evidence of record insufficient to satisfy appellant's burden, and therefore the Office properly denied his traumatic injury claim.

As of February 20, 2008, the date the Office conducted the merit review of this case, the relevant evidence of record consisted of an emergency room report from a nurse and reports and notes from Drs. Chesser and Denney. A report may not be considered probative medical evidence unless it can be established that the person completing the report is a "physician" as

[5] *G.T.*, *supra* note 4; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

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

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

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

defined in 5 U.S.C. § 8101(2).[10] The nurse's report is therefore not probative medical evidence in this case.

None of the reports from Drs. Chesser and Denney are sufficient to establish appellant's claim in this case because none of these reports contain a history of the incident and or opinion causally relating appellant's diagnosed conditions to this incident. The Office has accepted that appellant was working on the date in question and that he has alleged that he experienced pain following which he fell to the floor. The medical reports appellant submitted prior to February 20, 2008 noted diagnostic test findings, but offered no opinion regarding the cause of appellant's condition. As noted above, 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 that 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 Board has held that medical reports lacking an opinion on causal relationship are of limited probative value.[11] As none of the reports and notes from Drs. Chesser and Denney contained an opinion on causal relationship, they are of limited probative value and are insufficient to satisfy appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[12]

The Board has held that the fact that a condition manifests itself or worsens during a period of employment[13] or that work activities produce symptoms revelatory of an underlying condition[14] does not raise an inference of causal relationship between a claimed condition and employment factors.

As there is no probative medical evidence of record, appellant has not satisfied his burden of proof and, therefore, the Office properly denied his traumatic injury claim.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date

[10] *Thomas L. Agee*, 56 ECAB 465 (2005).

[11] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). *See also Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001).

[12] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

[13] *E.A.*, 58 ECAB ___ (Docket No. 07-1145, issued September 7, 2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[14] *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[15] The Board has held that the Office, in its broad discretionary authority in the administration of the Act,[16] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[17] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.

ANALYSIS -- ISSUE 2

The Office issued a merit decision denying appellant's claim on February 20, 2008. Appellant's request for an oral hearing was postmarked April 25, 2008. As this was over 30 days after February 20, 2008, the Board finds that he was not entitled to an oral hearing before a hearing representative as a matter of right.[18]

The Office exercised its discretion in this case and found that appellant's claim could equally well be addressed by requesting reconsideration and submitting additional evidence or by appealing to the Board. The only limitation on the Office's authority is reasonableness.[19] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions of known facts.[20] There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

Thus, the Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing before a hearing representative.

CONCLUSION

The Board finds appellant did not establish that he sustained an injury in the performance of duty on December 6, 2007. The Board also finds the Office's Branch of Hearings and Review properly denied his request for an oral hearing as untimely.

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[15] *Claudio Vazquez*, 52 ECAB 496 (2001).

[16] 5 U.S.C. §§ 8101-8193.

[17] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[18] *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000) (the date of the event from which the designated period of time begins to run shall not be included when computing the time period). *See* 20 C.F.R. § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

[19] *Linda J. Reeves*, 48 ECAB 373 (1997).

[20] *See Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the September 9 and February 20, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 8, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board