

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

G.M., Appellant)
and) Docket No. 10-783
U.S. POSTAL SERVICE, POST OFFICE,) Issued: December 21, 2010
Bay Shore, NY, Employer)

)

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 29, 2010 appellant filed a timely appeal of a September 30, 2009 decision of the Office of Workers' Compensation Programs affirming the denial of her claim for compensation and a December 29, 2009 decision denying her request for reconsideration without further merit review. 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 met her burden of proof to establish that she sustained an occupational disease in the performance of duty and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On March 4, 2009 appellant, then a 53-year-old letter carrier, filed a claim for a recurrence of disability beginning February 26, 2009 due to prolonged pushing, pulling and

lifting that worsened her pain. She indicated that the original date of injury was July 1, 2008. Appellant stopped work on February 6, 2009 and returned to light duty on February 26, 2009.¹

In a March 6, 2009 statement, appellant indicated that her condition was due to daily duties as a letter carrier that required constant lifting, pulling and pushing. On January 21, 2009 she lifted a heavy parcel resulting in pain to her neck, shoulder and upper back. Appellant noted that all of her claimed conditions were due to injuries sustained on July 1, 2008.² They were worsened by her daily duties as a letter carrier for eight hours a day. Appellant denied stating that her January 21, 2009 injury was due to a vehicle backing into her as it was due to lifting a heavy parcel that day. She also indicated that on February 26, 2009 she told her supervisor that she could not work because she was in too much pain. Appellant noted that her supervisor subsequently informed her there was no work within her work restrictions.

In a March 3, 2009 report, Dr. Timothy Mosomillo, an osteopath and physiatrist, advised that appellant injured her right shoulder while working on July 1, 2008. He noted her complaint of right shoulder pain. Dr. Mosomillo found that appellant's symptoms were consistent with shoulder strain/sprain, shoulder derangement, rotator cuff syndrome and muscle spasm.

On March 25, 2009 the Office advised appellant of the factual and medical evidence necessary to establish her claim and allowed her 30 days to submit additional evidence.

In a March 30, 2009 statement, appellant reiterated that her injuries resulted from her daily duties as a letter carrier, including constant lifting, pulling and pushing.

In a February 13, 2009 arthrogram of appellant's right shoulder, Dr. Pradeep Albert, a Board-certified diagnostic radiologist, found SLAP tear extending to the region of the biceps/labral anchor and edema extending to the glenohumeral ligament. He also noted under surface tearing of the supraspinatus tendon without evidence of full thickness of a rotator cuff tear.

In a May 28, 2009 decision, the Office denied appellant's claim finding the medical evidence failed to establish that the claimed medical conditions were causally related to the established employment activities.

In reports dated April 28, 2009, Dr. Peter Green, a Board-certified orthopedic surgeon, noted appellant's complaint of right shoulder pain. Appellant reported a history of a work injury to the right shoulder on July 1, 2008. Dr. Green diagnosed right shoulder SLAP tear, acromioclavicular joint arthritis, subacromial impingement and glenohumeral and subacromial

¹ On March 16, 2009 the Office notified appellant that the information she submitted did not demonstrate that she experienced a recurrence of disability as she described work duties that aggravated her condition. It indicated that her claim would be treated as a new occupational disease claim, in which she first realized that her claimed condition was caused or aggravated by her employment activities on February 26, 2009.

² Appellant filed a traumatic injury claim for a July 1, 2008 work incident, file number xxxxxx604 that was accepted for right shoulder impingement and surgery. She subsequently filed an occupational disease claim beginning January 21, 2009, file number xxxxxx608, that was accepted for right shoulder superior labral tear from anterior to posterior (SLAP tear). Neither claim is presently before the Board.

synovitis. He performed right shoulder arthroscopy, arthroscopy SLAP repair, glenohumeral and subacromial synovectomy with labrum debridement, subacromial decompression and arthroscopic mumford procedure. On April 28, 2009.

On June 19, 2009 appellant requested a review of the written record. She submitted a July 28, 2008 report, Dr. Green who saw her for the first time and indicated that she was working as a mail carrier on July 1, 2008 while walking past a driveway when a minivan struck her in the right shoulder and arm. Dr. Green diagnosed right shoulder impingement syndrome with myalgia. He opined that, "if the foregoing history is accurate, causal relationship existed between the patient's current complaints and the history of injury." On August 25, 2008 Dr. Green noted treating appellant for right shoulder impingement syndrome that was work related. He noted her complaint of pain in the right aspect of the neck, paresthesias in the right first and second digits and mild weakness in grip of the right hand that was not present prior to the work injury. Cervical spine x-rays taken that day showed decreased disc space at C5-6 and anterior spurring at C5-6 and C6-7. Dr. Green diagnosed right shoulder impingement syndrome, cervical strain and possible degenerative disc disease. He reiterated that, if the history provided was accurate, causal relationship existed between appellant's neck complaints and her work. On September 22, 2008 Dr. Green diagnosed right shoulder impingement syndrome and noted that she had avoided using the push cart for mail delivery to help prevent cervical and right shoulder symptoms. Subsequent reports addressed appellant's ongoing symptoms.

In a May 4, 2009 attending physician's report, Dr. Green noted the date of injury as July 1, 2008 when a minivan struck appellant. He diagnosed right shoulder impingement syndrome, cervical strain with myalgia and cervical spurring. Dr. Green checked a box "yes" indicating that appellant's conditions were caused or aggravated by her employment activities.

In a September 30, 2009 decision, an Office hearing representative affirmed the May 28, 2009 decision. The Office accepted that appellant's job duties required significant lifting, pushing and pulling. The hearing representative found, however, no medical evidence providing a diagnosis of a medical condition connected to the established employment exposure. Instead, she noted that the medical evidence provided a history of the July 1, 2008 work injury, that was the subject of another claim, without any history of the identified employment exposure, that was the subject of the instant claim.

On October 9, 2009 appellant requested reconsideration. She noted that her injury resulted from her daily duties of constant lifting, pulling and pushing as a letter carrier for 40 hours a week for 8 hours a day. Appellant indicated first noticing her condition on July 1, 2008 and that the pain became continuous to her shoulder, neck and upper back. She reiterated that constant moving, lifting and pushing as a letter carrier aggravated her condition. In a December 11, 2009 statement, appellant noted she was enclosing a letter from her surgeon hoping this would satisfy the requirement to establish fact of injury.

In a November 2, 2009 report, Dr. Green saw appellant in connection to a July 1, 2008 injury to her right shoulder that occurred when a driver backed a minivan into her and struck her in the right shoulder and arm. He noted that she ultimately was found to have a labral tear of the shoulder that was surgically treated. Dr. Green stated there was no evidence at any time of an occupational disease. In a December 7, 2009 duty status report, he advised that appellant was

able to resume work with restrictions for a July 1, 2008 work injury. Dr. Green diagnosed right shoulder SLAP lesion and right elbow bursitis. He checked a box "yes" indicating that appellant's condition was caused or aggravated by her employment activity.

In a December 29, 2009 decision, the Office denied appellant's request for reconsideration finding that she did not submit any new and relevant evidence or raise any substantive legal questions.

LEGAL PRECEDENT -- ISSUE 1

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.³

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.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, 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 establishes that appellant's duties as a letter carrier required significant lifting, pulling and pushing. She claimed that this caused her neck, shoulder and upper back condition. However, the medical evidence is insufficient to establish that appellant sustained injuries causally related to these factors of her employment.

³ *J.E.*, 59 ECAB 119 (2007); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *D.I.*, 59 ECAB 158 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁵ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Dr. Mosomillo's March 2, 2009 report indicated that appellant's right shoulder condition was sustained at work on July 1, 2008. However, the Office adjudicated the present claim as one for an occupational disease, as appellant attributed her symptoms to prolonged pushing, pulling and lifting in early 2009. As Dr. Mosomillo did not provide an accurate history relevant to this claim or attribute any diagnosed medical condition to work factors in early 2009, his opinion is insufficient to establish appellant's claim.⁶

Similarly, Dr. Green submitted reports dated July 28, 2008 to May 4, 2009. He supported that appellant sustained right shoulder and neck injuries due to a July 1, 2008 work-related incident. Dr. Green did not relate appellant's condition to lifting, pulling and pushing at work in early 2009 nor did he explain how such employment activities would cause or aggravate a diagnosed condition. Although his September 22, 2008 report noted that she avoided pushing a cart to deliver mail, this predated the period in which she indicated that her claimed condition began and he also indicated that the restrictions were to prevent her preexisting cervical and right shoulder symptoms. Dr. Green did not specifically address whether such activities caused or aggravated a diagnosed medical condition.⁷

No other medical evidence of record supports that appellant's condition to lifting, pulling and pushing at work in early 2009 caused or aggravated a diagnosed medical condition.

For these reasons, appellant has not established that she sustained an occupational disease in the performance of duty.

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.⁸ Section 10.608(b) of Office regulations provides 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.⁹

⁶ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history have little probative value).

⁷ See *S.E.*, 60 ECAB ____ (Docket No. 08-2214, issued May 6, 2009) (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).

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *K.H.*, 59 ECAB 495 (2008).

ANALYSIS -- ISSUE 2

Appellant's reconsideration request reiterated that her daily duties required constant lifting, pulling and pushing as a letter carrier for 40 hours a week for 8 hours a day. However, these statements do not satisfy the criteria necessary to reopen a case for merit review as they do not show that the Office erroneously applied a specific point of law and they do not advance any new legal arguments. The Board notes that appellant's work duties were not in dispute and were not the basis of the Office's previous denial of her claim.

Although Dr. Green's reports dated November 2 and December 7, 2009 constitute new evidence, they are not relevant as they pertain to appellant's July 1, 2008 work injury that is the subject of a separate claim and do not address the underlying issue in the present claim regarding whether she sustained an occupational disease beginning in early 2009. The Board has held that evidence that does not address the pertinent issue in a claim does not warrant a reopening of the case for a merit review.¹⁰ The reports from Dr. Green are also generally repetitive of his reports previously of record with regards to the cause of appellant's condition.¹¹

The record also contains Dr. Albert's February 13, 2009 arthrogram report and Dr. Green's reports dated between July 28, 2008 and February 23, 2009. As appellant previously submitted these documents to the record and they were considered in the Office's September 30, 2009 decision, they are duplicative and do not constitute a basis for reopening a case.¹²

On appeal, appellant asserts that her claim was not accepted because she attempted to work on two occasions when her pain worsened and her supervisor informed her there was no work based on her restrictions. As explained, her claim was denied because she did not submit sufficient medical evidence explaining how her work activities in early 2009 caused or aggravated a diagnosed medical condition.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an occupational disease in the performance of duty. The Board also finds that the Office properly denied her request for reconsideration without a merit review.

¹⁰ See E.M., 60 ECAB ____ (Docket No. 09-39, issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence).

¹¹ See D.K., *supra* note 8 (evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 29 and September 30, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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