

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

C.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 09-1269
Issued: February 24, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 10, 2008 merit decision denying her claim for compensation and a February 11, 2009 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant has established that she sustained an injury causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 8, 2008 appellant, then a 48-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a pinched nerve due to her employment activities. She first noticed her condition was caused or aggravated by her employment on April 29, 2008. The employing establishment advised appellant was claiming a neck and

shoulder condition due to repetitive motion involved in her employment. Appellant did not stop work. On May 19, 2008 the employing establishment offered her a modified distribution clerk assignment, which she accepted.

In a letter dated May 12, 2008, the Office informed appellant of the evidence needed to establish her claim. It advised her to submit details regarding the employment duties or exposures she believed caused or contributed to her claimed condition. It also requested a comprehensive medical report from a treating physician, which listed symptoms, a diagnosis and an opinion as to the cause of appellant's diagnosed condition.

In statements dated May 8, 22 and 29, 2008, appellant described her employment duties, which involved throwing, sorting, reaching, lifting, bending, pulling, pushing and overhead activities. Since November 2007 she experienced pain on the right side of her neck and right shoulder which became progressively worse. Appellant submitted medical documentation dated 1980, 1985 and 1986 together with medical records from Dr. Kenneth E. Mayeda, a Board-certified family practitioner. In a May 7, 2008 physician's initial report, Dr. Mayeda noted that appellant threw parcels, cased flats and letters, put parcels in overhead tubs and did hand stamps. He listed right shoulder pain and questionable right cervical radiculopathy. Dr. Mayeda indicated that appellant's right shoulder pain and questionable right cervical radiculopathy was probably caused by her work duties. In a May 15, 2008 progress note, he assessed right shoulder pain and questionable right cervical radiculopathy and advised her conditions were probably related to overuse at work. Dr. Mayeda noted there could be some rotator cuff tendinopathy, and possible right cervical radiculopathy and provided work restrictions. On May 28, 2008 he diagnosed right shoulder and right neck pain and provided work restrictions on overhead work, pushing and pulling through June 30, 2008.

In a July 10, 2008 decision, the Office denied appellant's claim finding that the medical evidence was not sufficient to establish causal relationship.

On November 17, 2008 appellant requested reconsideration. She noted physical therapy since July and that she saw a neurologist for diagnostic testing. The August 26, 2008 electromyogram (EMG) and nerve conduction velocity (NCV) studies listed minimal abnormal findings suggestive of right mid-cervical radiculopathy. The involved nerve root could not be localized. In June 17 and July 3, 2008 progress notes, Dr. Mayeda provided an assessment of right neck/shoulder pain and questionable radicular symptoms. He indicated that her work restrictions should continue. On July 24, 2008 Dr. Mayeda listed myofascial pain syndrome of the neck which he opined was probably related to a chronic repetitive injury and previous problems with right shoulder pain, which he opined were probably related to a strain. He noted there was some concern about a cervical radiculopathy in the past. In an August 12, 2008 duty status report, Dr. Mayeda provided a diagnosis of questionable right cervical radiculopathy.

In a February 11, 2009 decision, the Office denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review.¹

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of her claim, including the fact that an injury was sustained in the performance of duty as alleged,³ and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴

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 the 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.⁵ The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e.*, medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to claimant's diagnosed condition. To be of probative value, 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.⁶

An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish a causal relationship.⁷

¹ Appellant submitted additional evidence after the Office's February 11, 2009 decision and on appeal to the Board. However, the Board may not consider evidence that was not before the Office at the time it rendered its final decision or for the first time on appeal. 20 C.F.R. § 501.2(c). Appellant may submit such evidence to the Office with a formal request for reconsideration pursuant to 5 U.S.C. § 8128.

² 5 U.S.C. §§ 8101-8193.

³ *Joseph W. Kripp*, 55 ECAB 121 (2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). When an employee claims that he sustained injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and manner alleged. He must also establish that such event, incident or exposure caused an injury. *See also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (2002) (Occupational disease or Illness and Traumatic injury defined).

⁴ *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

⁵ *Michael R. Shaffer*, 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

⁶ *Leslie C. Moore*, 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

⁷ *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dennis M. Mascarenas*, *supra* note 4 at 218.

ANALYSIS -- ISSUE 1

The record supports that appellant's work duties as a mail distribution clerk included throwing, sorting, reaching, lifting, bending, pulling, pushing and overhead activities. The Office denied her claim due to the lack of medical evidence establishing that she sustained an injury as a result of her work activities.

Dr. Mayeda did not provide firm medical diagnoses of appellant's condition. He noted that she had right shoulder pain, neck pain and questionable right cervical radiculopathy.⁸ Dr. Mayeda also noted possible rotator cuff tendinopathy. On May 7, 2008 he advised that appellant's right shoulder pain and possible cervical radiculopathy were probably related to her work duties. In a May 15, 2008 report, Dr. Mayeda stated that they were probably related to overuse at work. While these reports provide some general support for causal relationship, he addressed causal relation in speculative terms. The Board has held that medical opinions which are speculative or equivocal in character are of diminished probative value.⁹ Dr. Mayeda's reports are insufficient to establish appellant's claim as they fail to provide a definitive diagnoses or a rationalized opinion on the causal relationship of her condition to her work duties. Dr. Mayeda did not explain the reasons how appellant's particular employment activities caused or aggravated the diagnosed medical conditions. The other medical evidence submitted predates appellant's claim and is not relevant to her claimed neck and right shoulder conditions.

Appellant failed to submit medical evidence supporting that the employment incidents caused a specific injury.

LEGAL PRECEDENT -- ISSUE 2

The Act¹⁰ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹¹ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹²

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

⁸ *Robert Broome*, 55 ECAB 339, 342 (2004) (pain is generally considered a symptom, not a compensable medical diagnosis).

⁹ *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ 5 U.S.C. § 8101 *et seq.*

¹¹ *Id.* at § 8128(a). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

¹² 20 C.F.R. § 10.605.

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹³

A request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

Appellant's November 17, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by the Office. Appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant did not submit relevant and pertinent new evidence not previously considered by the Office. The additional reports from Dr. Mayeda, while new, are not relevant. In the June 17 and July 3, 2008 progress notes, Dr. Mayeda did not provide any opinion on causal relation. On July 24, 2008 he provided an assessment of myofascial pain syndrome of the neck probably related to chronic repetitive injury and previous problems with right shoulder pain probably related to a strain. This report is essentially duplicative of his May 7 and May 15, 2008 reports, previously of record, which addressed causal relationship in the same manner. Evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a claim for merit review. The Office properly determined that this evidence did not constitute a basis for reopening the case for further merit review.¹⁵

Appellant also submitted an EMG/nerve conduction study and a physical therapy report. This information, while also new, is not relevant to the issue of whether appellant sustained an injury causally related to factors of her federal employment. The diagnostic testing is not relevant as it does not address the question of causal relationship. The report from a physical therapist is not considered competent evidence pursuant to the Act and, thus, would not be relevant to the underlying medical issue.¹⁶

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her November 17, 2008 request for reconsideration.

¹³ *Id.* at § 10.606. See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁴ *Id.* at § 10.608(b). See *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹⁵ *Denis M. Dupor*, 51 ECAB 482 (2000).

¹⁶ *George H. Clark*, 56 ECAB 162 (2004). See 5 U.S.C. § 8101(2).

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing her claim for an occupational disease. The Board further finds that the Office properly denied appellant's request for reconsideration without conducting a merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2009 and July 10, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 24, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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