

FACTUAL HISTORY

On February 1, 2007 appellant, then a 57-year-old mine safety and health inspector, filed a claim alleging that on January 25, 2007 he slipped on ice and injured his right shoulder while placing his briefcase into his car while at a motel parking lot. He did not stop work. An e-mail from the employing establishment to the Office confirmed that appellant was in travel status at the time of the incident

On November 18, 2008 the Office advised appellant of the factual and medical evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the relationship of his claimed right shoulder condition and the January 25, 2007 incident.

Dr. Deborah J. Schenck, Board-certified in preventative medicine, submitted reports dated November 24, 2008 to January 12, 2009. She treated appellant for right shoulder pain. Appellant reported on November 24, 2008 that two years prior he slipped on ice and hyper-abducted his right shoulder while placing a brief case in his van. He initially experienced some nagging pain; however, the pain had become more severe awakening him at night. Dr. Schenck noted findings of right shoulder impingement in flexion and abduction and a painful supraspinatus with some muscle wasting. On January 12, 2009 she reported that appellant noted doing better after physical therapy and was ready to return to work. Dr. Schenck advised that appellant could work without restrictions. She diagnosed improving impingement syndrome of the right shoulder with range of motion for flexion and abduction improved. Appellant also submitted records related to his physical therapy.

In a decision dated January 23, 2008, the Office denied appellant's traumatic injury claim on the grounds that the medical evidence was insufficient to establish that his right shoulder injury was causally related to the January 25, 2007 incident.

In a letter dated February 26, 2009, appellant requested an oral hearing before an Office hearing representative.

In a decision dated April 8, 2009, the Office denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² 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 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. These are the essential

² 5 U.S.C. §§ 8101-8193.

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.³

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.⁴ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁵

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.⁶ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a right shoulder injury when he slipped on ice while placing his brief case into his automobile while on travel status. The Board notes that the evidence supports that the incident occurred on January 25, 2007 as alleged. The Office accepted that appellant was in travel status in the performance of duty at the time of the incident. The Board finds, however, that the medical evidence is insufficient to establish that appellant sustained a right shoulder injury causally related to the January 25, 2007 work incident.⁸

³ *Gary J. Watling*, 52 ECAB 357 (2001).

⁴ *Michael E. Smith*, 50 ECAB 313 (1999).

⁵ *Id.*

⁶ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

⁸ Even though an employee is on a special mission or in travel status during the time a disabling condition manifests itself, the medical evidence must establish a causal relationship between the claimed condition and factors of employment. *Susan A. Filkins*, 57 ECAB 630 (2006).

On November 18, 2008 the Office advised appellant of the medical evidence needed to establish his claim. Appellant did not submit a rationalized medical report from an attending physician addressing how the January 25, 2007 work incident caused or aggravated his right shoulder condition.

Treatment records from Dr. Schenck and her physician's assistant noted findings of right shoulder impingement and reported appellant's work status. Dr. Schenck did not address the cause of appellant's right shoulder condition. She did not provide a rationalized opinion explaining how the right shoulder impingement found on November 28, 2008 related to the January 25, 2007 incident. There was no explanation for any delay in medical treatment from January 2007 to November 2008 or of any examination prior to that of Dr. Schenck. While the Office accepted that the incident occurred, Dr. Schenck did not address how appellant's right shoulder condition was caused or aggravated by slipping on the ice at work on January 25, 2007. She did not explain the process by which the noted hyper-abduction one and a half years earlier would result in the diagnosed condition or why any presently diagnosed condition was not due to any nonwork factors. The need for medical rationale is especially important where the claimed injury occurred on January 25, 2007 but appellant apparently did not seek treatment until November 24, 2008. This report is insufficient to meet appellant's burden of proof.

The records from the physical therapists are of no probative medical value as the Board has noted that physical therapists are not physicians as defined under the Act.⁹ Therefore, these reports are insufficient to meet appellant's burden of proof.

On appeal, appellant contends that his injury occurred on the job while he was on travel status and promptly reported it to his supervisor. He did not understand why the claim was rejected when it was initially approved. However, the record does not establish that the claim was ever accepted by the Office. As noted, the Office accepted that the January 25, 2007 work incident occurred as alleged. The Board has held that the fact that an employee is in travel status at the time a condition manifests itself does not raise an inference that the condition is causally related to his or her federal employment.¹⁰ The basis for the denial of the claim is that appellant did not submit sufficient medical evidence addressing how the January 25, 2007 incident caused or aggravated the right shoulder condition for which he first sought treatment on November 24, 2008. To establish his claim, appellant must submit a physician's opinion which explains the reasons that incident caused or aggravated his diagnosed condition.

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.¹¹ Causal relationship must be established by

⁹ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

¹⁰ See *Filkins supra* note 7.

¹¹ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

rationalized medical opinion evidence. The Office properly denied appellant's claim for compensation.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹³ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁴ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁵ The Office's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁶

ANALYSIS -- ISSUE 2

Appellant requested a hearing in a letter dated February 26, 2009. As the request was more than 30 days after issuance of the January 23, 2008 Office decision, appellant's request for an oral hearing was untimely filed.

The Office also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁷ There is no indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

¹² See 5 U.S.C. § 501.2(c). The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review evidence submitted by appellant after the October 29, 2008 Office decision.

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ 20 C.F.R. §§ 10.616, 10.617.

¹⁵ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

¹⁶ See *R.T.*, 60 ECAB ____ (Docket No. 08-408, issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a right shoulder injury. The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the April 8 and January 23, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 24, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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