

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

D.S., Appellant)	
)	
and)	Docket No. 10-161
)	Issued: October 5, 2010
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Ontario, CA, Employer)	

Appearances: *Case Submitted on the Record*
James R. Linehan, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On October 21, 2009 appellant, through counsel, filed a timely appeal from a June 2, 2009 decision of the Office of Workers' Compensation Programs that denied his claim for a left shoulder injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained a left shoulder injury in the performance of duty on August 1, 2006, as alleged.

FACTUAL HISTORY

On January 16, 2008 appellant, then a 58-year-old supervisor screener, filed a traumatic injury claim alleging that on August 1, 2006 he sustained a left shoulder rotator cuff tear and torn

labrum as a result of lifting a suitcase onto a table for examination.¹ The employing establishment controverted the claim.

By letter dated January 28, 2008, the Office informed appellant that the evidence of record was insufficient to support his claim. It requested that he submit additional medical and factual evidence within 30 days.

On August 15, 2007 Dr. P. Gregory Bohart, a Board-certified orthopedic surgeon, treated appellant and obtained a history of left shoulder surgery in 1979 for an acromioclavicular (AC) separation that occurred when appellant worked as a policeman. He now worked for transportation security as a supervisor and was required to lift bags frequently. Dr. Bohart noted that appellant went on a diet, lost weight and had been very aggressive with his exercises, bench-pressing well over 200 pounds. On physical examination, he noted pain in the AC joint and slightly positive impingement with normal rotator cuff function. X-rays showed degenerative joint disease of the AC joint and type II acromion.² Dr. Bohart noted that diagnostic testing would be obtained.

Appellant was examined again on August 22, 2007 for left shoulder pain that developed over several months and which prevented him from doing heavy lifting and heavy exercises. Dr. Bohart advised that an MRI scan showed no full thickness rotator cuff tear but a partial thickness bursal side tear with mild arthritis of the AC joint without significant spur formation. He diagnosed impingement syndrome of the left shoulder with partial rotator cuff tear and recommended arthroscopic surgery. The record reflects that appellant underwent arthroscopic surgery on September 13, 2007 for treatment of the left shoulder impingement and labral tear.³ On November 5, 2007 Dr. Bohart advised that appellant was seven weeks post surgery. He noted that appellant would not be able to return to unrestricted work involving repetitive and heavy lifting or overhead lifting. In a disability paper prepared that day, Dr. Bohart reiterated that appellant's left shoulder condition was not compatible with his current job. He noted that appellant's symptoms "probably began in June of this year," and that he was referred for physical therapy.⁴

In a November 5, 2007 statement, appellant related that, while lifting a suitcase at work on August 1, 2006, he felt some grinding and strain in his left shoulder. He noted that, following the injury, he attended supervisors' training for two weeks and continued to experience shoulder pain. Appellant worked for the next year with grinding in the shoulder joint. He noted that he

¹ The record reflects that on November 5, 2007 appellant initially filed an occupational disease claim alleging he first became aware of his left shoulder condition on August 1, 2006, but did not realize it was employment related until September 13, 2007. On November 29, 2007 appellant filed a traumatic injury claim alleging that on August 1, 2006 he injured his left shoulder while lifting a suitcase.

² An August 21, 2007 magnetic resonance imaging scan (MRI) revealed a partial thickness tear of the supraspinatus tendon in the left shoulder.

³ The surgery records described a left shoulder arthroscopy with subacromial decompression and a Mumford procedure.

⁴ Appellant submitted physical therapy reports dated September 21 to December 14, 2007. Molly Radlinski, a physical therapist, noted the diagnosis as repair of the anterior labral tear. She obtained a history that appellant injured his left shoulder approximately a year and a half prior while lifting weights at a gym.

had previously broken his left collar bone while working as a police officer for which he underwent surgery. Appellant first saw Dr. Bohart for treatment on August 15, 2007 and informed the physician that he had experienced shoulder pain for the past one and a half years.

On December 10, 2007 Dr. Bohart advised that appellant was doing well following surgery. He stated that he was reluctant to release appellant to return to his date-of-injury job which required unlimited lifting at times, as this was likely how he injured his shoulder to begin with. On physical examination, appellant had almost full left shoulder range of motion.

In a February 29, 2008 decision, the Office denied appellant's traumatic injury claim. It found inconsistencies in the claimed mechanics of injury as appellant attributed his condition to lifting a suitcase at work while treatment records noted that he also lifted weights at a gym. The Office also found that the medical evidence was insufficient to establish that appellant's left shoulder condition and need for surgery were caused by lifting a suitcase on August 1, 2006.

On February 27, 2009 appellant's counsel requested reconsideration and submitted medical evidence from Dr. K.C. Owsley, an attending physician and associate of Dr. Bohart. On August 29, 2008 Dr. Owsley diagnosed left shoulder labral tear and stated appellant was doing well since his shoulder surgery. He advised that the shoulder tear certainly could have been caused by lifting heavy bags at work, but noted he was not the treating physician at the time of surgery or injury. In a February 15, 2009 attending physician's report, Dr. Owsley diagnosed left shoulder labral tear and checked "yes" to the question of whether the condition was employment related. Under the comment section he noted "heavy lifting."

On April 23, 2008 Dr. Bohart advised that appellant had full left shoulder motion on physical examination. Appellant told the physician that he had shoulder symptoms prior to his injury, which was aggravated by lifting some weights. Dr. Bohart attributed appellant's condition to repetitive lifting. Appellant was restricted to lifting no more than 40 pounds, and on overhead lifting into an abducted position.

In a June 2, 2009 decision, the Office denied modification of the February 29, 2008 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁵ has the burden of establishing the essential elements of his 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.⁶ These are the essential elements of each and every

⁵ 5 U.S.C. §§ 8101-8193.

⁶ C.S., 60 ECAB ____ (Docket No. 08-1585, issued March 3, 2009).

compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

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.⁸ 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.⁹ 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.¹⁰

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on a claimant's statements.¹¹ The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.¹²

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.¹³ 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.¹⁴

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹⁵ 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.¹⁶ The opinion of the physician must be based on a complete

⁷ *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *B.F.*, 60 ECAB ___ (Docket No. 09-60, issued March 17, 2009).

⁹ *D.B.*, 58 ECAB 464 (2007).

¹⁰ *C.B.*, 60 ECAB ___ (Docket No. 08-1583, issued December 9, 2008); *D.G.*, 59 ECAB ___ (Docket No. 08-1139, issued September 24, 2008).

¹¹ *C.S.*, *supra* note 6; *Barbara R. Middleton*, 56 ECAB 634 (2005).

¹² *H.G.*, 59 ECAB ___ (Docket No. 07-2397, issued June 11, 2008); *Betty J. Smith*, 54 ECAB 174 (2002).

¹³ *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006); *Katherine J. Friday*, 47 ECAB 591 (1996).

¹⁴ *P.K.*, 60 ECAB ___ (Docket No. 08-2551, issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁵ *Y.J.*, 60 ECAB ___ (Docket No. 08-1167, issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006).

¹⁶ *J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

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.¹⁷

ANALYSIS

Appellant alleged that he sustained an injury to his left shoulder on August 1, 2006 while lifting a suitcase onto a table for examination in the performance of duty. The Office did not accept that the lifting incident occurred, as alleged. It further denied the claim on the basis that the medical evidence of record was insufficient to establish that appellant's shoulder condition was caused or aggravated by the alleged work incident. The Board finds that he has not established that he sustained the August 1, 2006 employment incident, as alleged.

An injury does not have to be confirmed by an eyewitness in order to establish that an employee sustained injury while in the performance of duty, but the employee's statement must be consistent with the surrounding course of action.¹⁸ An employee has not met his burden when there are such inconsistencies in the evidence that cast doubt on the validity of the claim.¹⁹

Appellant alleged that he lifted a heavy suitcase onto an examination table on August 1, 2006. The record establishes that he did not notify his employer of any injury at work on that day until he initially filed an occupational disease claim on November 5, 2007, some 15 months after the purported incident. Appellant did not seek immediate medical treatment for his left shoulder condition until he was examined by Dr. Bohart on August 15, 2007 a year after the claimed lifting incident. He did not address the reasons for his delay in seeking medical treatment or reporting the incident to his employer. Appellant noted only that, following the August 1, 2006 lifting incident, he attended supervisors' training for two weeks. He indicated that he continued to work for the next year with grinding in his left shoulder.

Dr. Bohart, an attending orthopedic surgeon, diagnosed degenerative joint disease of the acromioclavicular joint of the left shoulder with type II acromion, impingement syndrome and a labral tear. This diagnosis was based on MRI scan testing obtained a year following the implicated employment incident. The Board has generally held that the greater the delay in diagnostic testing, the greater the likelihood that an event not implicated by the employee has worsened the claimed injury or caused the condition for which the employee seeks compensation. When the delay becomes so significant, it calls into question the validity of an affirmative opinion based at least in part on the testing and diminishes the probative value of the opinion offered.²⁰

Dr. Bohart diagnosed impingement syndrome and a labral tear, but did not address how appellant could continue to work at his position for over a year with apparently minimal

¹⁷ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁸ See *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁹ See *Linda S. Christian*, 46 ECAB 598 (1995).

²⁰ *Id.*

discomfort and, at the same time, engage in a vigorous physical exercise program that included lifting weights. There is no explanation from the physician of how lifting a suitcase to a table would produce or contribute to impingement syndrome or a labral tear. The history relied upon by Dr. Bohart is not fully consistent as he made reference to the August 1, 2006 lifting incident but also noted that appellant engaged in repetitive heavy lifting while at work. The basis for the present claim is the alleged traumatic incident of August 1, 2006.²¹

While Dr. Bohart stated that this was likely how appellant sustained injury, the physician did not provide a full and accurate history of appellant's prior medical treatment as it related to his left shoulder. He noted only briefly that appellant had prior left shoulder surgery in 1979, but did not address how the preexisting left shoulder condition would cause or contribute to appellant's condition on August 1, 2006 while lifting a suitcase. There is no review of any medical treatment records bridging the period of time between appellant's surgery in 1979 to August 1, 2006. There is no description of the nature of the exercise program appellant was engaged in, other than noting that he bench pressed over 200 pounds. The nature of other exercises that pertain to shoulder motion and overhead lifting were not discussed. Dr. Bohart stated that appellant was very aggressive with his exercise program, but did not contrast the nature of placing luggage onto a table to specific exercises performed at the gym. He did not address how the findings on surgery in 2007 would relate to lifting a suitcase to a table a year prior. While Dr. Bohart noted that appellant's symptoms "probably began in June of this year," the notes from physical therapy indicate that appellant complained of injury to his shoulder sometime earlier in 2006 while lifting weights.

The treatment records from Dr. Bohart are speculative and equivocal on the issue of causal relation and aggravation. Dr. Bohart did not provide sufficient rationale in stating that appellant's symptoms were "aggravated by lifting some weights;" such comment is not addressed to the lifting incident implicated by appellant in the present case. These deficiencies reduce the probative value of the physician's opinion on causal relationship.²²

Appellant also submitted the reports of Dr. Owsley, a treating physician, who diagnosed a left shoulder labral tear and opined that the shoulder tear "certainly could have been caused by lifting heavy bags at work." The Board finds this opinion to be speculative and of diminished probative value.²³ Dr. Owsley did not provide a full and accurate medical history of appellant's medical treatment. In a February 15, 2009 attending physician's report, he diagnosed left shoulder labral tear and checked "yes" to the question of whether the condition was employment related, but is well established that, without additional explanation or rationale, such form report is insufficient on the issue of causal relation.²⁴ Moreover, as a physical therapist, Ms. Radlinski,

²¹ This decision does not preclude appellant from pursuing his occupational claim if he attributes his left shoulder condition to lifting activities over more than one work shift.

²² *A.D.*, *supra* note 12.

²³ *D.D.*, 57 ECAB 734 (2006); *Cecelia M. Corley*, 56 ECAB 662 (2005).

²⁴ *See Deborah L. Beatty*, 54 ECAB 334 (2003).

is not a physician as defined under the Act.²⁵ Her reports do not constitute probative medical opinion evidence.

On appeal, counsel contends that the medical evidence is sufficient to establish that the August 1, 2006 employment incident caused appellant's left shoulder condition. As noted, however, there are such deficiencies in the record that raise a substantial question as to whether the August 1, 2006 lifting incident occurred, as alleged. Appellant has not met his burden of proof to establish the employment incident claimed in this case. The Board will affirm the Office's June 2, 2009 decision.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a left shoulder injury on August 1, 2006, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 5, 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

²⁵ 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357.