

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

R.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Mayfield, OH, Employer**

)
)
)
)
)

**Docket No. 10-362
Issued: September 7, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 24, 2009 appellant filed a timely appeal of the October 23, 2009 merit decision of the Office of Workers' Compensation Programs. 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 on September 24, 2008 appellant sustained a back and right shoulder injury while in the performance of duty.

FACTUAL HISTORY

On September 29, 2008 appellant, then a 57-year-old distribution clerk, filed a traumatic injury claim alleging that on September 24, 2008 he sustained a back and right shoulder injury

when he was ordered by Tryphena Thomas, his supervisor, to work outside his 20-pound weight limitation by pushing a heavy mail container.¹

In notes dated September 4 and 22, 2008, December 4 and 22, 2008 and January 20, 2009, Dr. Freddie F. Fuentes, an attending Board-certified internist, provided diagnoses of a right shoulder sprain, right rotator cuff tear and syndrome and lumbar vertebrae dislocation.

On September 24, 2008 Darryl R. MacLeod, a treating chiropractor, provided a history of lower and middle back and right shoulder pain and provided findings on physical examination. His diagnoses included thoracic and lumbar subluxations. September 25, 2008 hospital emergency room notes from a physician's assistant diagnosed back pain.

On September 26, 2008 Thomas B. Torzok, a treating chiropractor, noted that appellant pushed a series of large carts up a small hill at work on September 24, 2008. He provided findings on physical examination and diagnosed lumbar and thoracic sprains and strains. Appellant was totally disabled through October 5, 2008. On October 3, 2008 Dr. Torzok released him to return to work with restrictions.

In a January 8, 2009 report, Dr. John J. Brems, a Board-certified orthopedic surgeon, noted that appellant sustained a right shoulder injury on September 3, 2008 while pulling a heavy mail bin. He reviewed the medical history and provided findings on physical examination. Dr. Brems diagnosed degenerative changes in his right shoulder.

On February 20, 2009 the Office requested additional information, including a medical report containing a diagnosis and a rationalized explanation as to how the diagnosed condition was causally related to the September 24, 2008 work incident.

On March 11, 2009 Dr. Fuentes discussed appellant's right shoulder condition sustained on September 2 or 3, 2008.

On March 12, 2009 Dr. MacLeod provided a history that appellant was required to push and pull carts at work and that these activities were consistent with the forces that would cause spinal subluxations and a shoulder strain.

By decision dated March 26, 2009, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained a back or right shoulder injury on September 24, 2008 while in the performance of duty.

On April 3, 2009 appellant requested an oral hearing that was held on August 19, 2009.

In reports dated September 2 to 28, 2009, Dr. Fuentes diagnosed coronary atherosclerosis and atrial fibrillation, an anxiety disorder beginning August 29, 2009 due to a change to the night shift at work and dysthymia.

¹ Appellant has another claim under the Office File No. xxxxxx297 accepted for a subluxation at L3-4 and a temporary aggravation of preexisting lumbar degenerative arthritis.

By decision dated October 23, 2009, the Office hearing representative affirmed the March 26, 2009 decision.

LEGAL PRECEDENT

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.² Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.³ An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.

To establish a causal relationship between an employee's condition and any disability claimed and the employment event or incident, he or she must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of 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 claimant.⁴

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that an employee'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.⁵

ANALYSIS

The Office accepted the first component of fact of injury, that appellant worked outside his physical restrictions on September 24, 2008. The second component is whether he sustained a medical condition as a result of the incident.

On September 24, 2008 Dr. MacLeod, a treating chiropractor, provided a history of lower and middle back and right shoulder pain and provided findings on physical examination. His

² *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

³ *T.H.*, 59 ECAB ____ (Docket No. 07-2300, issued March 7, 2008); *John J. Carbone*, 41 ECAB 354, 356-57 (1989).

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁵ *D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

diagnoses included thoracic and lumbar subluxations. On March 12, 2009 Dr. MacLeod provided a history that appellant was required to push and pull carts at work and opined that these activities were consistent with the forces that would cause spinal subluxations and a shoulder strain. Because Dr. MacLeod did not provide x-ray results in support of his diagnosis of spinal subluxations, he is not a physician under the Act.⁶ His reports are not probative on the issue of whether appellant sustained a work-related injury on September 24, 2008 when he worked outside his physical restrictions.

Dr. Torzok, also a treating chiropractor, noted that appellant pushed a series of large carts up a small hill at work on September 24, 2008. He provided findings on physical examination and diagnosed lumbar and thoracic sprains and strains. Because Dr. Torzok did not diagnose a subluxation as demonstrated on x-ray, he is not a physician under the Act.⁷ His reports are not probative on the issue of whether appellant sustained a work-related injury on September 24, 2008.

In notes dated September 4 and 22, 2008 to January 20, 2009, Dr. Fuentes provided diagnoses of a right shoulder sprain, right rotator cuff tear and syndrome and lumbar vertebrae dislocation. The September 4 and 22, 2008 notes predate the September 24, 2008 work incident and discuss a shoulder injury on September 3, 2008. Therefore, these notes do not establish that appellant sustained an injury on September 24, 2008 when he worked outside his physical restrictions. In his notes dated after the September 24, 2008 work incident, Dr. Fuentes did not provide a history of appellant working outside his restrictions or explain how the work activities that day caused an injury. Lacking a factual background and a rationalized opinion on causal relationship, these notes do not establish a work-related injury on September 24, 2008. Further, on March 11, 2009 Dr. Fuentes discussed appellant's right shoulder condition sustained on September 2 or 3, 2008, but he did not address the September 24, 2008 work incident. In reports dated September 4 to 28, 2009, Dr. Fuentes diagnosed coronary atherosclerosis and atrial fibrillation, an anxiety disorder beginning August 29, 2009 due to a change to the night shift at work and dysthymia, but these reports also did not address the September 24, 2008 work incident. The 2009 notes from Dr. Fuentes do not discuss the accepted work incident of appellant working outside his restrictions on September 24, 2008 or explain how the work incident caused a back or right shoulder condition as alleged. Therefore, these notes do not establish a work-related condition on September 24, 2008.

Dr. Brems noted that appellant sustained a right shoulder injury on September 3, 2008 while pulling a heavy mail bin, reviewed the medical history and provided findings on physical

⁶ In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Federal Employees' Compensation Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist. *See Mary A. Ceglia*, 55 ECAB 626 (2004). The Office's implementing regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on any x-ray film to an individual trained in the reading of x-rays. 20 C.F.R. § 10.5(bb) (2006) Dr. MacLeod's subluxation diagnosis was not supported by an x-ray report. Therefore, he is not a physician as defined in the Act and his report is not probative on the issue of whether appellant sustained a work-related injury on September 24, 2008.

⁷ *Id.*

examination and diagnosed degenerative changes in his right shoulder. He did not, however, discuss the September 24, 2008 work incident. Therefore, his report is not sufficient to establish that appellant sustained a back or right shoulder injury on September 24, 2008 as alleged.

The Board finds that the medical evidence is insufficient to establish appellant's claim.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury on September 24, 2008 while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 23, 2009 is affirmed.

Issued: September 7, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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