United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 10-672**
	)	**Issued: September 24, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Plain City, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 11, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated November 25, 2009 and January 29, 2010. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a right shoulder injury in the performance of duty on February 13, 2007; and (2) whether the Office abused its discretion in denying appellant's request for a hearing.

FACTUAL HISTORY

This case has previously been before the Board. In a December 19, 2008 decision,[1] the Board affirmed the Office's March 5, 2008 decision denying appellant's claim. The Board found

[1] Docket No. 08-1546 (issued December 19, 2008). Appellant alleged injury on February 13, 2007 while removing a chain hoist from a trolley. An April 30, 2007 magnetic resonance imaging (MRI) scan revealed a small full thickness tear of the supraspinatus and a degenerative slap tear.

that he presented sufficient evidence to establish that he sustained the February 13, 2007 injury at the time, place and in the manner alleged. The Board found, however, that appellant failed to submit sufficient rationalized medical opinion evidence to establish that the February 13, 2007 incident caused the claimed right shoulder injury. The facts of this case are set forth in the Board's decision and are herein incorporated by reference.

By letter dated August 26, 2009, appellant's attorney requested reconsideration. In an April 22, 2009 report, Dr. Martin D. Fritzhand, a Board-certified urologist, stated that appellant had experienced right shoulder symptoms prior to the February 13, 2007 work incident. He advised that appellant's pain and discomfort markedly increased following the incident, which constituted a "serious" accident. Dr. Fritzhand noted that the prior physicians of record attributed appellant's right rotator cuff tear to the February 13, 2007 work incident. He stated that it was within reasonable medical certainty that the February 13, 2007 incident caused a marked exacerbation of shoulder pain and that appellant's symptoms were caused by the pathology shown in an April 30, 2007 MRI scan. Dr. Fritzhand stated that the factual and medical evidence of record clearly demonstrated that the February 2007 incident resulted in considerable pain and suffering. He asserted that the level of symptomatology clearly indicated that a traumatic event, namely a rotator cuff tear, had occurred while appellant was performing his work duties on February 13, 2007.

By decision dated November 25, 2009, the Office denied the claim, finding that appellant failed to submit medical evidence sufficient to establish that he sustained a right shoulder injury in the performance of duty on February 13, 2007.

By letter dated December 4, 2009, appellant's attorney requested an oral hearing.

By decision dated January 29, 2010, the Office denied appellant's request for a hearing on the grounds that he had previously requested reconsideration and was not entitled to a hearing as a matter of right.[2] It exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing that 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 timely filed within the applicable time limitation period 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.[4] These are the

[2] The Office hearing representative stated that it was denied the request for a hearing pursuant to 5 U.S.C. § 8125(b)(1). This was apparently a misstatement or typographical error.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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. 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.[6] 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.[7] The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[8]

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 his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[9] Causal relationship must be established by rationalized medical opinion evidence and he failed to submit such evidence.

ANALYSIS -- ISSUE 1

The Board previously determined that appellant was lifting a chain hoist from a trolley on February 13, 2007. The question of whether an employment incident caused a personal injury can only be established by probative medical evidence.[10] Appellant has not submitted rationalized, probative medical evidence to establish that the February 13, 2007 employment incident caused injury to his right shoulder, as alleged

On April 22, 2009 Dr. Fritzhand stated that the level of symptomatology appellant displayed after the February 13, 2007 work incident demonstrated that he had sustained a torn right rotator cuff while he was performing his work duties on that date. He opined that this was a serious work accident which significantly increased appellant's pain and discomfort. Dr. Fritzhand stated that there was a reasonable medical certainty that the February 13, 2007 incident caused the marked exacerbation of appellant's right shoulder pain and that these symptoms were caused by the pathology shown by the April 30, 2007 MRI scan.

Although Dr. Fritzhand reiterated the diagnosis of appellant's condition, he did not adequately address how the right shoulder torn rotator cuff was caused by the February 13, 2007 work incident. In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(e).

[8] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[9] *Id.*

[10] *Carlone, supra* note 6.

examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion, are facts which determine the weight to be given to each individual report.[11] Dr. Fritzhand's report did not adequately address how removing a chain hoist from a trolley would cause or contribute to appellant's right shoulder symptomatology or right rotator cuff tear. There is some reference in the medical record to right shoulder complaints dating to September 2004, some two and a half years before the accepted incident. The record does not contain any medical records related to treatment in 2004 or indicate whether any diagnostic testing was obtained prior to the April 2007 MRI scan. In turn, Dr. Fritzhand does not provide a full history of any preexisting right shoulder pathology or treatment. While there is no question appellant engaged in removing chain hoists from trolleys, Dr. Fritzhand did not fully explain how the nature of such activity would cause or contribute to the diagnosed rotator cuff injury. These deficiencies reduce the probative value of his opinion.

The Office advised appellant of the evidence required to establish his claim; however, he failed to submit an adequate medical opinion based on a fall history. Appellant did not provide a medical opinion which explains the process through which the February 13, 2007 incident would have caused or contribute to the rotator cuff condition. Accordingly, he did not establish an injury on that date. The Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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.[12] A hearing is a review of an adverse decision by an Office hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[13] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.[14] A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision. The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[15] In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[16]

[11] *Michael S. Mina*, 57 ECAB 379 (2006).

[12] 5 U.S.C. § 8124(b)(1).

[13] 20 C.F.R. § 10.615.

[14] *James Smith*, 53 ECAB 188 (2001).

[15] 20 C.F.R. § 10.616(b).

[16] *James Smith*, *supra* note 14.

ANALYSIS -- ISSUE 2

On December 4, 2009 appellant requested an oral hearing and a review of the written record. Because he had previously requested reconsideration under section 8128 of the Act, he was not entitled to a hearing as a matter of right under section 8124(b)(1). The Office exercised its discretion and determined that the issue in the case could be resolved equally well through a request for reconsideration and the submission of additional evidence. The Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing in its January 16, 2009 decision.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a right shoulder injury on February 13, 2007. The Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2010 and November 25, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 24, 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