United States Department of Labor
Employees' Compensation Appeals Board

A.D., Appellant	)	
and	)	**Docket No. 11-168**
	)	**Issued: August 19, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Islandia, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 26, 2010 appellant filed a timely appeal from a September 30, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and a July 16, 2010 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 met his burden of proof to establish that he sustained a left shoulder injury in the performance of duty on March 15, 2010; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 15, 2010 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder injury when he was lifting an empty plastic tray. Appellant sustained his injury, filed his claim, stopped work and notified his supervisor on the same date. The employing establishment controverted the claim.

In a March 15, 2010 progress note, Dr. Andrea Quintana, a physician of osteopathic medicine, reported that appellant was lifting a tray at work that morning when he experienced sudden neck pain and pain in his left shoulder, arm and hand. She diagnosed neck pain and pain in the limb. In an April 9, 2010 progress note, Dr. Quintana also diagnosed muscle spasm.

In March 15 and 25, 2010 duty status reports (Form CA-17), Carol Markowitz, a registered nurse, noted that appellant was lifting a tray and felt pain in his left shoulder. She diagnosed pain in the left arm, hand and neck and restricted appellant from working.

In a March 22, 2010 medical report, Dr. Steven Peyser, Board-certified in radiology, reported that a magnetic resonance imaging (MRI) scan of appellant's cervical (C) spine showed spondylitic changes with bulging C5-6 resulting in mild left-sided foraminal stenosis. He also diagnosed focal spondylitic ridging in C6-7 with mild left-sided foraminal stenosis as well.

In medical reports dated April 5 and 9, 2010, Ms. Markowitz reported that the MRI scan of appellant's c-spine showed bulging with foraminal stenosis.

In an April 6, 2010 medical report, Dr. Patrick Reid, Board-certified in otolaryngology, stated that appellant had been symptomatic since March 15, 2010 after he bent over at work to pick up an empty plastic tray weighing about 1 to 2 pounds. He reported that since the incident, appellant was experiencing left-sided neck pain and associated numbness in his right medial forearm as well as weakness in his hands. Upon physical examination and review of appellant's MRI scan, Dr. Reid noted that at C5-6, there was a disc bulge with a left paracentral disc osteophyte complex which was indenting the thecal sac and causing foraminal stenosis. He opined that the left-sided neck pain was likely myofacial in nature since the MRI scan showed no significant abnormalities which could account for appellant's symptoms and diagnosed cervicalgia.

In duty status reports dated April 6 to 26, 2010, Dr. Reid reported that on March 15, 2010 appellant was lifting a tray and felt a sharp pain in his left shoulder. He diagnosed a herniated cervical disc and restricted appellant from working.

In a May 5, 2010 report of termination of disability (Form CA-3), appellant's supervisor reported that appellant returned to full duty on May 3, 2010.

By letter dated June 15, 2010, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In a June 25, 2010 letter, appellant stated that on March 15, 2010 he was reaching to lift a tray and felt a sharp pain in his shoulder, which caused numbness in his left hand and elbow and

pain in his neck. He noted that he went to see a physician that same date. After diagnostic testing was performed, appellant was diagnosed with herniated cervical disc. He reported that he did not have any similar disabilities or symptoms prior to this injury.

By decision dated July 16, 2010, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury because he did not submit any medical evidence containing a medical diagnosis in connection with the accepted March 15, 2010 employment incident. It noted that the medical evidence submitted contained a diagnosis of "pain" which is a symptom and not a diagnosed medical condition.[2]

By letter dated August 12, 2010, appellant requested reconsideration of OWCP's decision. He noted that Dr. Reid's April 6, 2010 report specifically diagnosed him with cervicalgia and also provided causal relationship when the physician stated that appellant had been symptomatic since March 15, 2010 after he bent over at work to pick up a tray.

By letter dated August 14, 2010, Linda Bassett, the Office Manager for Quintana Family Medical, reported that appellant was treated on March 15, 2010 for an injury he sustained while working at the employing establishment. She resubmitted Dr. Reid's April 6, 2010 medical report to support that she was injured when he was at work.

By decision dated September 30, 2010, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and

[2] The decision of July 16, 2010 employs a numbered list of "5 basic elements." Element 3 of the list is titled "Fact of Injury" and is repeated below: "Establish *Fact of Injury*, which has both a factual and medical component. Factually, the injury, accident, or employment factor alleged must have actually occurred. Medically, a medical condition must be diagnosed in connection with the injury or event."

OWCP went on to explicitly inform appellant that his claim was denied in the language below:

> Specifically, your case is denied because you did not submit any medical evidence containing a medical diagnosis in connection with the injury and/or event(s). Medical reports from Dr. Reid has diagnosed your medical condition as left-sided neck pain, numbness of the forearm and medial two fingers. In addition, diagnostic test results were submitted but a rationalized or probative opinion was not provided in connection with the May 15, 2010 incident. Findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury determination. Pain is considered to be a symptom not a diagnosis therefore these diagnoses are of no probative value.

relevant evidence establishing fact of injury.[3] It noted that the medical evidence submitted was a restatement of medical evidence already on file, irrelevant and repetitious.[4]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 FECA; 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 or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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.[7] 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.[8] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the

[3] In the September 30, 2010 decision, OWCP elaborated in its assertion that appellant's only diagnosis was pain:

> "In the prior decision your claim was denied on the basis that your physician had not provided a diagnosis in connection with your injury. It is noted that your physician provided diagnosis of pain and numbness in his report.

[4] The Board notes that appellant submitted additional evidence after OWCP rendered its September 30, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell,* 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[5] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

condition is related to the injury. 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.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that the March 15, 2010 incident occurred as alleged. It denied appellant's claim on the grounds that it lacked sufficient medical evidence to support that the alleged condition was medically related to the March 15, 2010 employment incident. The Board finds that appellant did not submit sufficient medical evidence to support that he sustained a shoulder injury causally related to the March 15, 2010 employment incident.[10]

In an April 6, 2010 medical report, Dr. Reid reported that appellant had been symptomatic since March 15, 2010 after he bent over at work to pick up an empty plastic tray. He opined that the left-sided neck pain was likely myofacial in nature and diagnosed cervicalgia. In duty status reports dated April 6 to 26, 2010, Dr. Reid diagnosed herniated cervical disc and restricted appellant from working. In a March 22, 2010 radiology report, Dr. Peyser diagnosed left-sided foraminal stenosis.

In its July 16, 2010 decision, OWCP found insufficient evidence to establish a firm medical diagnosis of appellant's condition, noting that pain is considered to be a symptom and not a diagnosis. The Board finds, however, that, contrary to OWCP's finding, the medical evidence of record establishes a sufficient diagnosis of right cervicalgia, herniated cervical disc and left-sided foraminal stenosis. OWCP's decision noted that Dr. Reid diagnosed appellant's medical condition as left-sided neck pain, numbness of the forearm and medial two fingers, finding that appellant did not submit any medical evidence containing a diagnosis. It failed to address and consider Dr. Reid's April 6 and 26, 2010 duty status reports which diagnosed herniated cervical disc, as well as Dr. Peyser's March 22, 2010 radiology report which diagnosed left-sided foraminal stenosis. Thus, appellant has established fact of injury, because the medical evidence is sufficient to establish a diagnosed medical condition.[11] Given that appellant has established a diagnosed condition, the question becomes whether the March 15, 2010 incident caused his shoulder injury. Thus, appellant must submit rationalized medical evidence to establish that his diagnosed medical condition is causally related to the accepted March 15, 2010 employment incident.

While Dr. Reid's report establishes a diagnosis, it is not rationalized as to the issue of causal relation. In his April 6, 2010 report, Dr. Reid noted that appellant was bending over to pick up a tray on March 15, 2010 and injured his left shoulder. This medical report is not well-rationalized as Dr. Reid did not provide an adequate explanation of how the incident accepted in this case caused or contributed to appellant's herniated cervical disc injury. He merely recounted

[9] *James Mack*, 43 ECAB 321 (1991).

[10] *See Robert Broome*, 55 ECAB 339 (2004).

[11] *See supra* notes 1 and 2. To the extent that the decisions dated July 16 and September 30, 2010 failed to mention that the medical record before OWCP provided diagnosis other than "pain," the orders failed to place appellant fairly on notice of the reasons his claim was denied.

the incident as described by appellant and did not determine that appellant's condition was work related or offer a rationalized opinion on the issue of causal relationship.[12] The reports of Dr. Reid are of limited probative value on the issue of causal relationship and appellant failed to meet his burden of proof with the submission of these reports.[13]

In March 15 and April 9, 2010 progress notes, Dr. Quintana reported that appellant was lifting a tray at work on that date when he experienced sudden neck pain and pain in his left shoulder, arm and hand. She diagnosed neck pain, pain in the limb and muscle spasm. In a March 22, 2010 medical report, Dr. Peyser reported that appellant's MRI scan showed mild left-sided foraminal stenosis. While Dr. Quintana and Dr. Peyser's medical records addressed appellant's treatment and injury, the physicians failed to state a causal relationship between appellant's condition and the March 15, 2010 employment incident. They did not determine that appellant's condition was work related and did not offer a rationalized opinion on the issue of causal relationship.[14] The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[15] Without medical reasoning explaining how appellant's employment caused his injury, the reports are not sufficient to meet appellant's burden of proof.[16]

The remaining medical evidence of record is also insufficient to establish causal relationship. Appellant submitted duty status reports and medical notes dated March 15 to April 9, 2010 from Ms. Markowitz. This medical evidence is insufficient to establish a causal relationship between appellant's injury and the March 15, 2010 employment incident. Registered nurses, licensed practical nurses and physicians assistants, they are not physicians as defined under FECA, their opinions are of no probative value.[17]

On appeal, appellant contends that he has established a firm medical diagnosis as well as causal relationship with the medical reports he submitted. While he has established a firm medical diagnosis for his injury, he has not established that his diagnosed condition is causally related to the accepted March 15, 2010 employment incident. Appellant's honest belief that work caused his medical problem is not in question. But that belief, however, sincerely held, does not constitute the medical evidence necessary to establish causal relationship. In the instant case, the record is without rationalized medical evidence establishing that the diagnosed medical condition is causally related to the accepted March 15, 2010 employment incident. Thus, appellant has failed to establish his burden of proof.

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

[13] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[14] *Supra* note 11.

[15] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[16] *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

[17] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) 'physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

Evidence submitted by appellant after the final decision cannot be considered by the Board. As previously noted, the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.[18] Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[19] Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[20]

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In his August 12, 2010 narrative statement, appellant reported that Dr. Reid diagnosed him with cervicalgia and addressed causal relationship when the physician stated that appellant had been symptomatic since March 15, 2010 when he bent over at work to pick up a tray. In support of his statement, appellant resubmitted Dr. Reid's April 6, 2010 medical report. In an August 14, 2010 letter, Ms. Bassett, Office Manager for Quintana Family Medical, reported that appellant was treated on March 15, 2010 for an injury he sustained at work.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his August 12, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant's argument was that his injury was employment-related and he referenced the medical reports provided by Dr. Reid and Quintana. The underlying issue in this case was whether his injury was causally related to the accepted March 15, 2010 employment incident. Although it is appellant's belief that he has been injured, this is a medical issue which must be addressed by relevant medical evidence.[21] While the letter from Ms. Bassett is new evidence and has some connection to appellant's employment, it is not relevant to the issue for

[18] 20 C.F.R. § 501.2(c)(1).

[19] *D.K.*, 59 ECAB 141 (2007).

[20] *K.H.*, 59 ECAB 495 (2008).

[21] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

which OWCP denied appellant's claim as it does not include a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's injury and the March 15, 2010 incident. Further, Dr. Reid's April 6, 2010 report was already considered by OWCP in its July 16, 2010 decision and is not new evidence. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on March 15, 2010 in the performance of duty. OWCP properly denied his request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated September 30 and July 16, 2010 are affirmed, as modified.

Issued: August 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board