United States Department of Labor
Employees' Compensation Appeals Board

L.N., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer**	**Docket No. 10-1695** **Issued: May 3, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 14, 2010 appellant filed a timely appeal from a March 9, 2010 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and a March 26, 2010 nonmerit decision denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act[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 January 8, 2010; and (2) whether the Office 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 January 13, 2010 appellant, then a 46-year-old tractor-trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on January 8, 2010 he was pulling to unload a trailer and felt a strain on his left arm and shoulder. He notified his employer on January 8, 2010 and returned to work the following day. Appellant first received medical care for his injury on January 18, 2010.

In a January 18, 2010 return to work note, Dr. Robert Wolf, a Board-certified orthopedic surgeon, indicated that appellant could return to work but could not use his left arm. In a January 18, 2010 physical therapy authorization request, he diagnosed appellant with left shoulder impingement and recommended four weeks of physical therapy, twice a week.

In a January 18, 2010 medical report, Dr. Wolf noted that appellant was unloading a truck at work on January 8, 2010 and injured his left shoulder. Upon physical examination, he reported that appellant had a very positive impingement reinforcement sign with pain in the anterior and lateral shoulder region. Dr. Wolf noted that x-rays of the shoulder showed no fracture or dislocation. He recommended a magnetic resonance imaging (MRI) scan to rule out a rotator cuff tear. In a January 26, 2010 Authorization for Examination/Treatment (Form CA-16), Dr. Wolf diagnosed rotator cuff tear. He recommended no use of the left arm when returning to work.

In a January 26, 2010 MRI scan of appellant's left shoulder, Dr. Michael Mead, a treating radiologist, reported a small partial articular surface tear of the left supraspinatus tendon. He also noted an impression of OS acromial with degenerative changes.

In a January 28, 2010 return to work authorization note, Dr. Wolf reported that appellant had been treated for left shoulder pain and could return to work on regular, full-time duty. An unsigned and undated physician's duty status report (Form CA-17) diagnosed appellant with rotator cuff tear of the shoulder and limited his lifting and carrying to 70 pounds.

In a February 1, 2010 physical therapy progress note, Amy Prewitt, a treating physical therapist, reported that appellant's left shoulder joint pain required approximately four weeks of therapy for three times a week.

By letter dated February 3, 2010, the Office informed appellant that, because his medical bills had exceeded $1,500.00, it must formally adjudicate his claim. It further noted that Dr. Wolf's diagnosis for rotator cuff tear was merely speculative and requested a detailed report from his physician, including a history of injury, examination findings, test results, diagnosis, treatment provided, prognosis, period and extent of disability and an opinion on the relationship of the diagnosed condition to his federal employment activity.

Appellant submitted physical therapy notes dated February 9 to March 2, 2010, which tracked the progress of his left shoulder. In a February 26, 2010 physical therapy request, Dr. Wolf indicated that appellant should be treated twice a week for four weeks.

By decision dated March 9, 2010, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury. It found that the January 8,

2010 incident occurred as alleged; however, that Dr. Wolf's diagnosis was speculative and the evidence failed to provide a firm medical diagnosis which could be reasonably attributed to the claimed work injury on January 8, 2010.

On March 9, 2010 appellant requested reconsideration of the Office decision. In a March 14, 2010 narrative statement, he noted that he was still in the rehabilitation and evaluation stages of his injury and continued to experience pain. Appellant further requested that the Office explain the basis for the denial of his claim.

Appellant submitted a March 1, 2010 physical therapy request from Dr. Wolf noting that appellant should continue therapy twice a week for four weeks. In March 4 and 9, 2010 physical therapy notes, his treating physical therapists reported that he was progressing with his therapy well and had been feeling better. In a March 10, 2010 return-to-work authorization note, Dr. Wolf indicated that appellant should not use his left shoulder for two weeks but then could return to regular duty.

By decision dated March 26, 2010, the Office denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence establishing fact of injury. It noted that the medical evidence submitted was a restatement of medical evidence already on file, irrelevant and repetitious.[2]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act 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; 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[4]

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.[5] The second

[2] The Board notes that appellant submitted additional evidence after the Office rendered its March 26, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 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 the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

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

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

[5] *Elaine Pendleton*, *supra* note 3 at 1143 (1989).

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.[6] 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. This medical opinion must include an accurate history of the employee's employment injury and must explain how the 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that the January 8, 2010 incident occurred as alleged. The issue is whether appellant established that the incident caused a left shoulder injury. The Board finds that he did not submit sufficient medical evidence to support that the accepted employment incident caused or aggravated his shoulder injury.[8]

In its March 9, 2010 decision, the Office found that there was insufficient evidence submitted to establish a firm medical diagnosis for appellant's alleged injury. The Board finds, however, that, contrary to the Office finding, the medical evidence of record establishes a firm medical diagnosis. Given that appellant has established a January 8, 2010 employment incident and a diagnosed condition, the question becomes whether the employment incident caused his left shoulder problem.

In a January 18, 2010 physical therapy authorization request, Dr. Wolf diagnosed appellant with left shoulder impingement and recommended no use of his left arm when at work. In a January 18, 2010 medical report, he noted that appellant was unloading a truck at work on January 8, 2010 and injured his left shoulder. Upon physical examination, Dr. Wolf reported that appellant had a very positive impingement reinforcement sign with pain in the anterior and lateral shoulder region. He diagnosed possible rotator cuff tear and recommended an MRI scan of the left shoulder. In a January 26, 2010 CA-16 form, Dr. Wolf also noted his findings as possible rotator cuff tear. In a January 26, 2010 MRI scan report, Dr. Mead noted that appellant's left shoulder showed a small partial articular surface tear of the left supraspinatus

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

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

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

tendon and OS acromial with degenerative changes. In a January 28, 2010 note, Dr. Wolf reported that appellant had been treated for left shoulder pain and could return to work on regular and full-time duty.

Dr. Wolf has provided a firm diagnosis of left shoulder impingement. He further noted that appellant had a very positive impingement reinforcement sign with pain in the anterior and lateral shoulder region. Though Dr. Wolf speculated that appellant had a possible left rotator cuff tear, the diagnosis of left shoulder impingement has never been modified or questioned. Dr. Mead also provided a firm diagnosis based on the results of appellant's MRI scan, finding a small partial articular surface tear of the left supraspinatus tendon and OS acromial with degenerative changes.

In its March 9, 2010 decision, the Office omitted Dr. Wolf's findings of left shoulder impingement and failed to address the results of Dr. Mead's MRI scan of a small tendon tear and OS acromial. A finding that appellant had not established a firm medical diagnosis cannot rest on a simple omission of diagnoses found in the record. Based on these medical reports, the Board finds that he has met his burden of proof to establish diagnosed medical conditions in his left shoulder.[9]

While the reports of Dr. Wolf and Dr. Mead establish a diagnosis, they are not rationalized as to the issue of causal relation. In his January 18, 2010 report, Dr. Wolf noted that appellant was unloading a truck at work on January 8, 2010 and injured his left shoulder. This medical report is not well rationalized as he did not provide an adequate explanation of how the incident accepted in this case caused or contributed to appellant's shoulder injury. Further, Dr. Wolf failed to identify or specifically address any clinical findings or test results covering the left shoulder. He did not determine that appellant's condition was work related and did not offer a rationalized opinion on the issue of causal relationship.[10] The reports of Dr. Wolf 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.[11]

Dr. Mead's January 26, 2010 report is also insufficient to meet appellant's burden of proof. Though he diagnosed tendon tear and OS acromial, he failed to address the January 8, 2010 incident or the cause of appellant's condition. 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.[12] The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the nature of the

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[9] *Linda S. Christian*, 46 ECAB 598 (1995).

[10] *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).

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

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

relationship between the diagnosed condition and the established incident or factor of employment.[13]

The remaining medical evidence of record is also insufficient to establish causal relationship. Appellant submitted physical therapy reports dated February 1 to March 2, 2010 tracking the progress on his left shoulder. The Board has held that physical therapists are not physicians under the Act.[14] Therefore, these reports do not constitute probative medical evidence.[15]

On appeal, appellant contends that the Office should have further developed his case by sending a letter to his physician for additional information. He also stated that he was never given a proper opportunity to get a second opinion or to see what was wrong with his shoulder and that his therapy was stopped before he had a chance to see if it was working. As stated, it is appellant's burden of proof to submit the evidence necessary to establish his claim. Moreover, in its February 3, 2010 development letter, the Office requested that he obtain a detailed narrative report from his attending physician and outlined the additional evidence needed. For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to prove or disprove such relationship.[16] The Board is not persuaded to adopt appellant's conclusion as set forth in his appeal.

In the instant case, the record is without rationalized medical evidence establishing a causal relationship between the accepted January 8, 2010 employment incident and appellant's shoulder injury. Thus, appellant has failed to establish his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under the Act section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[17] Section 10.608(b) of Office 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), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18]

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[13] *See Lee R. Haywood*, 48 ECAB 145 (1996).

[14] 5 U.S.C. § 8101(2).

[15] *L.D.*, 59 ECAB 273 (2008); *Vicky L. Hannis*, 48 ECAB 538 (1997); *R.C.*, Docket No. 09-2095 (issued August 4, 2010).

[16] *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *G.A.*, Docket No. 09-2153 (issued June 10, 2010).

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

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

ANALYSIS -- ISSUE 2

The Board finds that the refusal of the Office 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 March 14, 2010 narrative statement, appellant noted that he was still in the rehabilitation and evaluation stages of his injury and continued to experience pain. His brief statement in support of the reconsideration request did not allege or demonstrate that the Office erroneously applied or misinterpreted a specific point of law or advance a relevant legal argument it had not previously considered.[19]

Appellant submitted a March 1, 2010 physical therapy request from Dr. Wolf noting that appellant should continue therapy twice a week for four weeks. In a March 10, 2010 return to work authorization note, Dr. Wolf reported that appellant should not use his left shoulder for two weeks but could then return to regular duty. These reports are essentially repetitive of his earlier reports and are insufficient to require that the Office reopen the case for review of the merits of appellant's claim.[20] Moreover, they do not address the issue on which the Office decision was based, namely, that the January 8, 2010 incident caused or aggravated appellant's shoulder complaints.[21] Therefore, they are irrelevant.

Appellant also submitted physical therapy notes dated March 4 and 9, 2010. As noted, these reports do not constitute competent medical evidence. Therefore, they too are irrelevant and do not constitute a basis for reopening appellant's claim.[22]

Appellant's submissions on reconsideration do not address the particular issue involved in his claim and thus, do not constitute a basis for reconsideration.[23] The underlying issue in his claim was that he failed to submit medical evidence establishing that his shoulder condition was caused by the accepted incident. As the issue was medical in nature, it could only be resolved through the submission of probative medical evidence.[24] Appellant did not offer any new, pertinent medical evidence pursuant to his request for reconsideration. Since he did not meet any

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[19] *Sherry A. Hunt*, 49 ECAB 467 (1998).

[20] Evidence that repeats of duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *Eugene F. Butler*, 36 ECAB 393 (1984).

[21] Although the Office placed excessive emphasis on the question of a "firm diagnosis" it is also clear that the Office considered the issue of causal connection between the accepted incident and the conditions identified by appellant.

[22] *David J. McDonald*, 50 ECAB 185 (1990).

[23] *R.M.*, 59 ECAB 690 (2008); *D.K.*, 59 ECAB 141 (2007).

[24] *L.H.*, 59 ECAB 253 (2007); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

of the requirements warranting reconsideration under 20 C.F.R. § 10.606, the Office properly denied his request for reconsideration without further review of the merits.[25]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on January 8, 2010 in the performance of duty. The Office properly denied his request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated March 26 and 9, 2010 are affirmed, as modified.

Issued: May 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[25] 20 C.F.R. § 10.608; *J.M.*, Docket No. 09-218 (issued July 24, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).