United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 11-368**
	)	**Issued: October 6, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Seattle, WA, Employer	)	

Appearances:
David Dillard, for the appellant
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 December 3, 2010 appellant, through his representative, filed a timely appeal from an October 20, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish that his right shoulder condition is causally related to a December 6, 2009 employment incident, as alleged.

On appeal appellant's representative explained that appellant misunderstood OWCP's December 23, 2009 inquiry regarding "any similar disability or symptoms before the injury" to

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the issuance of the October 20, 2010 OWCP decision and on appeal appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

mean the time immediately preceding the alleged December 6, 2009 injury. Appellant did not mention his 1999 rotator cuff surgery because it was successful, he returned to full-duty work and he was not experiencing any pain or discomfort until the evening of December 6, 2009. He also contends that OWCP attempted to discredit appellant's statements by pointing out that he described his action on December 6, 2009 as "pulling" off-the-road containers (OTRs) and Dr. Francis Mercado, a Board-certified internist, referred to it as "throwing."

FACTUAL HISTORY

On December 11, 2009 appellant, then a 57-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on December 6, 2009 he sustained a right shoulder rotator cuff injury while pulling OTRs from vans in the performance of duty. His supervisor indicated that appellant did not feel any pain or discomfort while performing his duties. Appellant felt sharp pain while at home on his day off and did not seek medical treatment until three days later.

By letter dated December 23, 2009, OWCP notified appellant that the evidence submitted was insufficient to support his claim. It allotted 30 days for him to submit additional evidence and respond to its inquiries.

In a December 11, 2009 medical report, Dr. John W. Fuchs, a family medicine physician, diagnosed acute bursitis with rotator cuff syndrome and opined that there was a strong likelihood of a rotator cuff tear. He reported that appellant twisted his shoulder while moving OTRs on December 6, 2009, initially had pain in the anterior compartment and some paresthesias and loss of grip strength in the right arm, and could not raise his arm to brush his teeth and could hardly use it for any activities of daily living by the following morning. Dr. Fuchs indicated that appellant had only 25 percent of forward abduction and 20 percent of lateral abduction in the right shoulder and could not lift up his arm. Appellant could place his arm across his chest with assistance, three rotator cuff signs and maneuvers localized to the anterior capsule of the shoulder, and was point tender over the biceps groove and in the anterior shoulder compartment. Dr. Fuchs noted appellant's history of chronic pain syndrome since 2001, impingement syndrome of the right shoulder and right rotator cuff repair in 1999.

In a December 11, 2009 duty status report, Dr. Fuchs diagnosed rotator cuff tear and advised appellant to return to work on December 11, 2009 with medical restrictions, including no use of his right shoulder and arm for one month.

In a January 22, 2010 narrative statement, appellant explained that he did not immediately seek medical attention because there were no immediate effects of the injury. He stated that it took two days for him to realize that he had an injury due to other nonemployment-related pains.

By decision dated January 26, 2010, OWCP denied appellant's claim on the grounds that the medical evidence submitted was not sufficient to establish causal relationship.

Subsequently, appellant submitted a January 25, 2010 medical report by Dr. Mark A. Friedman, a Board-certified orthopedic surgeon, that noted either right shoulder impingement

syndrome or recurrent right rotator cuff tear. Dr. Friedman's reported that the right upper extremity was grossly distally neurovascularly intact. Passively appellant had full elevation and internal and external rotation, but actively he had difficulty elevating beyond 90 degrees. Dr. Friedman opined that appellant's strength was good with resisted external rotation and supraspinatus testing. Appellant's impingement signs were mixed. Dr. Friedman recommended a magnetic resonance imaging (MRI) scan and surgical repair in the case of tear or retear of the rotator cuff or physical therapy if no tear.

On April 7, 2010 appellant, through his representative, requested reconsideration and submitted additional evidence in support of his claim.

Appellant submitted an August 3, 1999 medical record of his rotator cuff repair surgery, a series of medical reports related to the 1999 surgery and duty status reports dated January 25, April 12 and June 20, 2010.

In a December 10, 2009 medical report, David R. Brand, a physician's assistant, diagnosed rotator cuff tendinitis and restricted appellant from lifting more than 10 pounds with his right arm.

In a January 28, 2010 radiological report by Dr. George T. Wang, a Board-certified radiologist, who indicated that a right shoulder MRI scan revealed moderate amount of fluid in the right subacromial-subdeltoid bursa, suggestive of bursitis, mild right supra and infraspinatus tendinosis without evidence of significant retear, and that evaluation of the labrum was limited without intraarticular contrast. He reviewed and compared January 25, 2010 right shoulder radiographs. Dr. Wang reported appellant's history of right shoulder pain since December 6, 2009 and rotator cuff surgery in 1999.

In a February 10, 2010 medical report, Dr. Mercado diagnosed right shoulder bursitis, most likely resulting from a work injury on December 6, 2009, labral tears and right shoulder pain. He opined that appellant may definitely have developed a bursitis and possible labral tears from throwing the OTRs.

By decision dated October 20, 2010, OWCP denied modification of the January 26, 2010 decision on the grounds that the medical evidence submitted was not sufficient to establish causal relationship.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 timely filed within the applicable time

[3] 5 U.S.C. §§ 8101-8193.

limitation period of FECA, that an injury[4] was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[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. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. 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. 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 employee.[7]

ANALYSIS

OWCP has accepted that the employment incident of December 6, 2009 occurred at the time, place and in the manner alleged. The issue is whether appellant's right shoulder condition resulted from the December 6, 2009 employment incident. The Board finds that appellant did not meet his burden of proof to establish a causal relationship between the condition for which compensation is claimed and the December 6, 2009 employment incident.

On December 11, 2009 Dr. Fuchs diagnosed acute bursitis with rotator cuff syndrome and opined that there was a strong likelihood for a rotator cuff tear. He reported that appellant twisted his shoulder while moving OTRs on December 6, 2009 and could hardly use it for any activities of daily living by the following morning. In a December 11, 2009 duty status report, Dr. Fuchs diagnosed rotator cuff tear and advised appellant to return to work that same day with medical restrictions. In a January 28, 2010 radiological report, Dr. Wang indicated that a right

[4] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[5] *T.H.*, 59 ECAB 388 (2008). *See Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Id. See Gary J. Watling*, 52 ECAB 278 (2001).

shoulder MRI scan revealed moderate amount of fluid in the right subacromial-subdeltoid bursa which was suggestive of bursitis and diagnosed mild right supra and infraspinatus tendinosis without evidence of significant retear. On February 10, 2010 Dr. Mercado diagnosed right shoulder bursitis, most likely resulting from a December 6, 2009 work injury, labral tears and right shoulder pain. He opined that appellant may definitely have developed a bursitis and possible labral tears from throwing the OTRs. Although Drs. Fuchs, Wang and Mercado provided firm diagnoses, they failed to directly address the issue of causal relationship as they did not explain how the mechanism of the December 6, 2009 employment incident caused or aggravated appellant's right shoulder condition. Moreover, Drs. Fuchs and Mercado couched their opinions in speculative terms. Therefore, appellant did not meet his burden of proof as the medical reports of Drs. Mercado, Fuchs and Wang are not sufficient to establish that appellant sustained an employment-related injury on December 6, 2009.

On January 25, 2010 Dr. Friedman diagnosed either right shoulder impingement syndrome versus recurrent right rotator cuff tear. He reported that the right upper extremity was grossly distally neurovascularly intact and appellant had difficulty elevating his arm beyond 90 degrees. Dr. Friedman opined that appellant's impingement signs were mixed. 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.[8] The medical report of Dr. Friedman does not provide a firm diagnosis or medical rationale explaining how appellant's right shoulder condition was caused or aggravated by the December 6, 2009 employment incident. Lacking thorough medical rationale on the issue of causal relationship, the report is of limited probative value and not sufficient to establish that appellant sustained an employment-related injury in the performance of duty on December 6, 2009.

The report from Mr. Brand, a physician's assistant, is of no probative value as he is not a physician under FECA.[9] As such, the Board finds that appellant did not meet his burden of proof with this submission.

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained an injury causally related to the indicated employment factors, he has failed to meet his burden of proof.

On appeal appellant's representative contends that OWCP attempted to discredit appellant's statements by pointing out that appellant described his action on December 6, 2009 as "pulling" whereas Dr. Mercado referred to it as "throwing." As OWCP accepted the incident, the Board finds that the representative's argument is not substantiated.

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

[9] 5 U.S.C. § 8101(2). Section 8101(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." *See also Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not submitted sufficient rationalized medical opinion evidence to establish that the December 6, 2009 employment incident was causally related to the right shoulder condition. Therefore, appellant failed to meet his burden of proof to establish a claim.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 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