United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 11-472**
	)	**Issued: September 30, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Harrisburg, PA, 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 December 14, 2010 appellant filed a timely appeal from the June 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim and the September 21, 2010 nonmerit decision denying his request for merit review. 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 sustained a right shoulder injury while in the performance of duty on April 28, 2010; and (2) whether the refusal of OWCP to reopen appellant's case for further merit review pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 3, 2010 appellant, a 41-year-old postal inspector, filed a traumatic injury claim alleging that he sustained a right shoulder injury on May 28, 2010 while lifting weights during a work-related physical fitness regime.[2] A May 3, 2010 duty status report, signed by Dr. Timothy S. Ackerman, a Board-certified osteopath, specializing in orthopedic surgery, indicated that appellant was injured while lifting weights on the date in question during a physical fitness program.

In a letter dated May 12, 2010, OWCP informed appellant that the information submitted was insufficient to establish his claim and allowed him 30 days to submit additional information, including a detailed account of the alleged injury and a physician's report, with a diagnosis and a rationalized opinion as to the cause of the diagnosed condition.

Appellant submitted a May 3, 2010 report from Dr. Ackerman. He informed Dr. Ackerman that he had reinjured his right shoulder on April 28, 2010 during a physical fitness routine.[3] Appellant was reportedly working on an incline bench when his shoulder gave out. Examination of the right shoulder revealed significant weakness with attempted supination. Forward elevation was to 90 degrees; strength was 3/5 in the supraspinatus and 4/5 in the infraspinatus and subscapular. There was no tenderness to palpation over the acromioclavicular joint. X-rays of the cervical spine showed some anterior osteophyte which appeared to be broken on the anterior aspect of the C5 region. Dr. Ackerman diagnosed a "likely C-spine injury with nerve root impingement and a herniation of disc leading to the right shoulder, difficulty secondary to weakness and/or rotator cuff tear or labral tear." The record contains a May 3, 2010 x-ray of the cervical spine and right shoulder.

In an undated statement, appellant indicated that he had never experienced strength loss in his right shoulder prior to the claimed April 28, 2010 injury. He noted that in March 2009, he had a prior claim for a right shoulder injury, which resulted in pain rather than weakness.

In a May 27, 2010 report, Dr. Ackerman reviewed the history of injury, as related by appellant. Appellant reported that a week before the April 28, 2010 incident he was doing incline bench workout and felt a twinge in his neck and some pain in the posterior aspect of the neck and shoulder. The pain improved until April 28, 2010 when he was doing incline bench again and the weights gave out on him. Appellant had been experiencing pain ever since, with occasional twinges in his neck to the posterior shoulder and neck pain to significant weakness in his arm. Examination of the neck revealed full range of motion and 5/5 muscle strength. Appellant was actively able to raise his right arm to about 120 degrees and abduct to 90 degrees. Strength in the supraspinatus, infraspinatus and subscap was 4/5. Appellant had no weakness of biceps flexion. He did, however, have weakness with supination (4.5/5) and weakness in the triceps. A magnetic resonance imaging (MRI) scan of the cervical spine revealed right

[2] Appellant was in a physical fitness program sanctioned by his employing establishment whereby he must spend three hours on off-duty time engaged in physical fitness.

[3] Dr. Ackerman noted that appellant sustained a prior work-related right shoulder injury in April 2009. (File No. xxxxxx008).

paracentral disc protrusion at C5-6 with mild compression on the cervical cord at this level. An MRI scan of the right shoulder did not reveal any labral tear, rotator cuff or internal derangement other than some mild impingement and rotator cuff tendinitis. Dr. Ackerman opined that the shoulder was "clear." Regarding the cervical spine, based on MRI scan findings and significant weakness, he recommended evaluation by a spine specialist. In an accompanying duty status report, Dr. Ackerman noted findings of cervical disc protrusion and released appellant to return to full duty.

Appellant submitted May 27, 2010 progress notes from Dr. Eric M. Kutz, a Board-certified osteopath, specializing in orthopedic surgery, who related that appellant "recently was weight lifting and developed an acute onset of weakness of the right upper extremity." Dr. Kutz's examination of the cervical spine revealed slight decreased range of motion, secondary to stiffness. Sensation was intact. Grip strength was 5/5. Flexion and extension at the elbow and wrist were 5/5. Strength was 4/5 with adduction of the right shoulder. A recent MRI scan showed significant degenerative changes at C5-6. Dr. Kutz diagnosed degenerative disc disease at C5-6 with disc protrusion.

The record contains a June 14, 2010 memorandum of conference between Team Leader Murphy of the employing establishment and an OWCP claims examiner. Team Leader Murphy confirmed that appellant was in fact performing authorized physical training at home as part of the employing establishment's physical fitness program when he was injured.

The record contains progress notes for the period June 3 through 10, 2010, signed by a physical therapist.

By decision dated June 15, 2010, OWCP denied appellant's claim. Although it accepted that the work event occurred as alleged, it found that the medical evidence did not contain a diagnosis that could be connected to the accepted event and, therefore, was insufficient to establish that appellant had sustained an injury under FECA on April 28, 2010.

On June 22, 2010 appellant requested reconsideration. He stated that Dr. Ackerman informed him that his condition was a direct result of lifting weights. Appellant noted that his injury was temporary and that his condition had improved as a result of prescribed physical therapy. He represented that he was including a copy of a June 8, 2010 letter from Dr. Ackerman confirming his opinion that the diagnosed condition was caused by the April 28, 2010 incident. No such letter was included with appellant's request.[4]

Appellant submitted a May 27, 2010 prescription for physical therapy signed by Dr. Kutz, containing a diagnosis of cervical sprain and degenerative joint disease. The record also contains physical therapy notes for the period June 1 through 21, 2010, signed by physical therapists.

By decision dated September 21, 2010, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant merit review.

[4] The record does not contain a copy of a June 8, 2010 letter from Dr. Ackerman.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[6]

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of 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 limitation, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[7] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the fact of injury, consisting of two components, which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[8]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[9] An award of compensation may not be based on appellant's belief of causal relationship.[10] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[11] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under FECA.[12]

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[5] 5 U.S.C. § 8102(a).

[6] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

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

[8] *Deborah L. Beatty*, 54 ECAB 340 (2003). *See also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term injury as defined by FECA, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q)(ee).

[9] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[10] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[11] *Id.*

[12] 20 C.F.R. § 10.303(a).

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 that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion 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 established incident or factor of employment.[13]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant was a federal employee, that he timely filed his claim for compensation benefits and that the April 28, 2010 work-related incident occurred as alleged and occurred within the performance of duty.[14] The issue, therefore, is whether he has submitted sufficient medical evidence to establish that the employment incident caused an injury. The medical evidence presented does not contain a rationalized medical opinion establishing that the work-related incident caused or aggravated any particular medical condition or disability. Therefore, appellant has failed to satisfy his burden of proof.

On May 3, 2010 Dr. Ackerman stated that appellant had reinjured his right shoulder on April 28, 2010 during a physical fitness routine. He provided examination findings and diagnosed a "likely C-spine injury with nerve root impingement and a herniation of disc leading to the right shoulder, difficulty secondary to weakness and/or rotator cuff tear or labral tear." Dr. Ackerman did not provide a definitive diagnosis. Moreover, he did not offer an opinion as to the cause of appellant's cervical and shoulder conditions. Medical evidence which 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] Similarly, Dr. Ackerman's May 3, 2010 duty status report lacks probative value, as it does not contain a definitive diagnosis or an opinion on causal relationship.

In a May 27 report, Dr. Ackerman reviewed the history of the April 28, 2010 injury and provided examination findings. He noted the results of a cervical spine MRI scan, which revealed right paracentral disc protrusion at C5-6 with mild compression on the cervical cord, and an MRI scan of the right shoulder, which did not reveal any labral tear, rotator cuff or internal derangement other than some mild impingement and rotator cuff tendinitis. In an accompanying duty status report, Dr. Ackerman noted findings of cervical disc protrusion and released appellant to return to full duty. As neither report contained an opinion as to the cause of appellant's conditions, they are of limited probative value. Although Dr. Ackerman noted appellant's statement that he was injured on the date in question, he did not offer his own opinion

[13] *John W. Montoya*, 54 ECAB 306 (2003).

[14] OWCP confirmed with the employing establishment that at the time of injury appellant was performing physical training at home as part of its physical fitness program.

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

on causal relationship or explain the medical process whereby the lifting incident would be competent to cause the diagnosed conditions.

In May 27, 2010 progress notes, Dr. Kutz related that appellant "recently was weight lifting and developed an acute onset of weakness of the right upper extremity." He provided examination findings and diagnosed degenerative disc disease at C5-6 with disc protrusion. Although Dr. Kutz described the events of April 28, 2010, as reported by appellant, he did not offer his own opinion as to the cause of appellant's current condition. Therefore, his report is of diminished probative value and is insufficient to establish appellant's claim.

The record contains progress notes signed by a physical therapist. As these reports were not signed by individuals that qualify as "physicians" under FECA, the Board finds that they do not constitute probative medical evidence.[16] The record does not contain an opinion by any qualified physician supporting appellant's contention that his neck or shoulder condition was causally related to the accepted April 28, 2010 event.

Appellant expressed his belief that his neck and shoulder conditions resulted from the April 28, 2010 employment incident. 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.[17] Neither the fact that the condition became apparent during a period of employment, nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[18] Causal relationship must be substantiated by reasoned medical opinion evidence, which it is appellant's responsibility to submit. Therefore, appellant's belief that his condition was caused by the work-related incident is not determinative.

OWCP advised appellant that it was his responsibility to provide a comprehensive medical report which described his symptoms, test results, diagnosis, treatment, and the doctor's opinion, with medical reasons, on the cause of his condition. Appellant failed to submit appropriate medical documentation in response to OWCP's request. As there is no probative, rationalized medical evidence addressing how his claimed shoulder or neck condition was caused or aggravated by his employment, he has not met his burden of proof in establishing that he sustained an injury in the performance of duty causally related to factors of his federal employment.

[16] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 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 Merton J. Sills*, 39 ECAB 572, 575 (1988).

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

[18] *Id.*

LEGAL PRECEDENT -- ISSUE 2

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[19]

The application for reconsideration must set forth arguments and contain evidence that either:

(1) shows that OWCP erroneously applied or interpreted a specific point of law;

(2) advances a relevant legal argument not previously considered by OWCP; or

(3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[20]

A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[21] Where the request is timely but fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[22]

ANALYSIS -- ISSUE 2

By decision dated June 15, 2010, OWCP denied appellant's claim on the grounds that the medical evidence failed to establish a causal relationship between the accepted April 28, 2010 incident and his current conditions. The issue is whether the evidence and argument submitted in support of his June 22, 2010 request for reconsideration is sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(2). The Board finds that appellant failed to 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.

In his application for reconsideration, appellant did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did he advance a new and relevant legal argument. Rather, his argument was based on the representation that Dr. Ackerman told him that his condition was a direct result of lifting weights and that his injury was temporary and had improved as a result of prescribed physical therapy. These arguments repeat those previously made and are not legal in nature.

[19] 20 C.F.R. § 10.605.

[20] *Id*. at § 10.606.

[21] *Donna L. Shahin*, 55 ECAB 192 (2003).

[22] 20 C.F.R. § 10.608.

A claimant may be entitled to a merit review by submitting new and relevant evidence. Appellant did not, however, submit new and relevant medical evidence in this case. He submitted a May 27, 2010 prescription for physical therapy signed by Dr. Kutz, containing a diagnosis of cervical sprain and degenerative joint disease. Appellant also submitted physical therapy notes for the period June 1 through June 21, 2010. This information contained in these documents is repetitive of those previously received and reviewed by OWCP and is, therefore cumulative and duplicative in nature.[23] The Board finds that Dr. Kutz's report does not constitute relevant and pertinent new evidence not previously considered by OWCP.[24] Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant represented that he was including a copy of a June 8, 2010 letter from Dr. Ackerman confirming his opinion that the diagnosed condition was caused by the April 28, 2010 incident. The Board notes that the record does not contain a letter from Dr. Ackerman dated June 8, 2010.

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 has failed to meet his burden of proof to establish that he sustained a traumatic injury in the performance of duty on April 28, 2010. The Board further finds that OWCP did not abuse its discretion in refusing to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[23] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

[24] *See Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the September 21 and June 15, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.[25]

Issued: September 30, 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

[25] 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.