

**United States Department of Labor
Employees' Compensation Appeals Board**

M.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 13-2074
Issued: May 9, 2014**

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, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 10, 2013 appellant filed a timely appeal of the April 15, 2013 decision of the Office of Workers' Compensation Programs (OWCP), which denied his occupational disease claim. He also appealed a July 26, 2013 decision, which denied his request for an oral hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an occupational disease in the performance of duty; and (2) whether OWCP properly denied appellant's request for an oral hearing.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant requested an oral argument. The Clerk of the Board mailed a December 13, 2013 letter to appellant to confirm a continuing desire for an oral argument in Washington, DC. No written confirmation was received. The Board has decided the appeal on the record.

FACTUAL HISTORY

On October 11, 2012 appellant then a 55-year-old city carrier, filed a Form CA-2, occupational disease alleging a right shoulder condition while performing repetitive work duties. He advised that he had a 10 percent disability rating from the Department of Veterans Affairs (VA). Appellant realized that his condition was causally related to his employment on October 2, 2012.

On March 12, 2013 OWCP advised appellant of the evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the causal relationship of his claimed condition to specific work factors.

On October 5, 2012 appellant was treated by Dr. Robert Petrie, a Board-certified family practitioner, for right shoulder pain while lifting. His initial injury occurred while he was in the military. Appellant reported that 15 to 20 years prior he had a recurrent dislocation of the right shoulder and a magnetic resonance imaging (MRI) scan showed a partial rotator cuff tear. He reported moderate pain that recently became worse with lifting. Dr. Petrie noted appellant's complaint of numbness along the dorsum of the right hand, abduction and flexion were limited to 90 degrees and there was tenderness in the superior acromioclavicular (AC) joint. He injected a steroid and diagnosed right shoulder impingement with possible radial neuropathy. Appellant was returned to work modified duty. In an October 8, 2012 physician's first report of occupational injury or illness, Dr. Petrie noted that appellant had right shoulder pain and numbness in the dorsum of the right hand. Appellant reported being injured at work and having recurrent dislocations 15 to 20 years prior and recently experiencing worsening pain with lifting. Dr. Petrie noted positive findings on examination and diagnosed right shoulder impingement.

Appellant provided VA medical records. On December 27, 2010 he was treated by Dr. Tara L. Pernot, a Board-certified internist, for a shoulder injury sustained when he fell while in the military. Appellant reported a history of multiple dislocations, rotator cuff tears and ligament issues but indicated that he was not symptomatic. Dr. Pernot diagnosed shoulder pain from prior trauma and partial rotator tear. Appellant was seen by Dr. Asma M. Kazi, a Board-certified internist, on October 4, 2011 for an annual visit. Dr. Kazi advised that he had a shoulder injury in the military when he fell and later had multiple dislocations, rotator cuff tears and ligament issues. Appellant's shoulder was stable for many years and did not require treatment. Dr. Kazi diagnosed shoulder pain from prior trauma and partial rotator tear with mild pain. On October 16, 2012 she treated appellant for worsening right shoulder pain. Appellant reported right shoulder pain on and off for the past few years with decreased range of motion and weakness. Dr. Kazi diagnosed right rotator cuff tear, shoulder pain with history of trauma, partial rotator tear with mild pain and limited range of motion. On October 29, 2012 she noted that an x-ray revealed a small osteophyte at the inferior glenohumeral joint representing mild degenerative changes. On December 20, 2012 appellant was treated by Dr. Wendy Wong, a resident, for right shoulder pain. He reported an episode of right shoulder anterior dislocation at age 19 when he fell while running in boot camp and underwent a closed reduction of the shoulder. Appellant indicated that he did not have a problem until three years prior when he started work at the employing establishment. He performed pushing and pulling with his arm. Dr. Wong noted pain in the anterior and lateral aspect of the right shoulder, worse with overhead activities and a limited range of motion. She noted that an x-ray of the right shoulder dated

December 20, 2012 revealed no significant arthritis or acute bony abnormalities and diagnosed right shoulder pain with remote history of dislocation.

The diagnostic test reports include a normal October 5, 2012 right shoulder x-ray. An October 18, 2012 right shoulder x-ray showed no arthritis or bony abnormality but a suspected triangular density along the inferior aspect of the glenoid of uncertain etiology. An October 26, 2012 right shoulder x-ray revealed a small osteophyte at the inferior glenohumeral joint representing mild degenerative changes. A March 5, 2013 right shoulder MRI scan showed superior labral degeneration or tear, moderate AC joint hypertrophic arthropathy causing narrowing of the subacromial space, possibly impingement, small intrasubstance or articular surface partial thickness tear and tendinopathy and small subdeltoid bursal fluid/bursitis.

In a statement dated April 4, 2013, appellant stated that his condition began when he was in the military when he fell and partially dislocated his right shoulder. In September 2011 he was reassigned from the letter carrier craft to the mailhandler craft. Appellant's duties included pushing and pulling bulk mail containers, repetitively placing flat mail in containers, loading empty casers and loading and unloading trucks, which contributed to his right shoulder condition. He reported performing these duties 8 to 10 hours a day.

In an April 15, 2013 decision, OWCP denied appellant's claim. It accepted that he performed receptive work with his right arm but found that the medical evidence was insufficient to establish that his condition was casually related to the accepted work activities.

In an appeal request form dated June 24, 2013, appellant requested a telephonic oral hearing. He submitted an October 29, 2012 report from Dr. Kazi, previously of record. Appellant also submitted a June 18, 2013 shoulder and arm disability benefits questionnaire prepared by Dr. Mark B. Stern, a Board-certified orthopedic surgeon, who diagnosed a right labral tear and partial tear of the right rotator cuff. Dr. Stern reported that appellant apparently injured his right shoulder at work.

In a decision dated July 26, 2013, OWCP denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in his case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the

manner alleged. Appellant must also establish that such event, incident or exposure caused an injury.³

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. 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.⁴

ANALYSIS -- ISSUE 1

OWCP accepted that appellant's work duties included repetitive lifting, pushing and pulling of mail containers and carrying packages. The Board finds that he has not submitted sufficient medical evidence to establish that his right shoulder condition was caused or contributed to by his work activities.

The record reflects that appellant first sustained a right shoulder injury while in the military when he fell. He was rated with a 10 percent service-connected disability. Dr. Petrie diagnosed right shoulder impingement and possible radial neuropathy. He returned appellant to work at modified duty. In his first report of occupational injury or illness, Dr. Petrie noted appellant's history and that he recently had more pain with lifting. He did not adequately explain how appellant's work duties caused or contributed to the findings from examination in 2012. Dr. Petrie did not provide a rationalized opinion addressing the causal relationship between appellant's right shoulder condition and the factors of employment believed to have caused or contributed to such condition.⁵ Therefore, his reports are insufficient to meet appellant's burden of proof.

³ See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989). See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury).

⁴ *Solomon Polen*, 51 ECAB 341 (2000).

⁵ See *T.M.*, Docket No. 08-975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

The December 20, 2012 report from Dr. Wong noted appellant's prior history of a right shoulder anterior dislocation at age 19 when he fell in boot camp and subsequently underwent surgery. She noted that, three years prior, he started working at the employing establishment and his duties required him to push and pull with his arm. Dr. Wong noted that a December 20, 2012 x-ray of the right shoulder revealed no significant arthritis or acute bony abnormalities. She diagnosed right shoulder pain with remote history of dislocation; however, she did not specifically state how any of appellant's work duties caused or aggravated his right shoulder condition. Dr. Wong did not provide adequate medical rationale explaining how pushing and pulling at work contributed to his condition or how his preexisting condition was contributed by his activities at work. Therefore, this report is insufficient to meet appellant's burden of proof.

The reports from Dr. Kazi noted appellant's military injury history but do not relate a history of the claimed work injury.⁶ She did not offer any opinion regarding whether work factors caused or contributed to the diagnosed medical condition.⁷ Consequently, Dr. Kazi's reports are of diminished probative value and insufficient to establish appellant's occupational claim. The remainder of the medical evidence of record is insufficient as it does not provide any opinion on the causal relationship between his job and his diagnosed right shoulder condition.

On appeal, appellant disagreed with OWCP's decision denying his claim and noted that he submitted sufficient evidence to establish his claim. As noted, the Board finds that the medical evidence does not establish that his right shoulder condition is causally related to his employment. The reports from appellant's physician's failed to provide sufficient medical rationale explaining how his right shoulder condition was caused or aggravated by his particular employment duties. The need for such rationale is particularly important in view of his preexisting right shoulder condition.

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary ... 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."⁸ Section 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.⁹ A claimant is entitled to a hearing or review of the

⁶ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

⁷ *See J.F.*, Docket No. 09-1061 (issued November 17, 2009) (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 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. §§ 10.616, 10.617.

written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.¹⁰ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹¹

ANALYSIS -- ISSUE 2

Appellant requested a telephonic oral hearing in a June 24, 2013 appeal form. As the hearing request was made more than 30 days after issuance of the April 15, 2013 OWCP decision, appellant's request for an oral hearing was untimely filed and he is not entitled to an oral hearing as a matter of right.

OWCP also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.¹² There is no indication that OWCP abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

Consequently, OWCP properly denied appellant's request for an oral hearing.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his claimed conditions were causally related to his employment.¹³ The Board further finds that OWCP properly denied appellant's request for an oral hearing.

¹⁰ *Id.* at § 10.616(a).

¹¹ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹² *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹³ With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the July 26 and April 15, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 9, 2014
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board