

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hartford, CT, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-373
Issued: May 22, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 4, 2013 appellant filed a timely appeal from a June 17, 2013 merit decision and an October 31, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.²

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish bilateral carpal tunnel syndrome causally related to factors of his federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the June 17, 2013 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP with a request for reconsideration.

FACTUAL HISTORY

On April 5, 2013 appellant, then a 60-year-old customer service manager, filed an occupational disease claim alleging that he developed pain in both hands, wrists, upper back and neck. He first became aware of his condition and realized it resulted from his employment on April 2, 2013. Appellant did not stop work.

On May 13, 2013 OWCP advised appellant that there was insufficient evidence to establish his claim. It requested that he respond to an attached questionnaire and submit medical evidence to establish a diagnosed condition as a result of his employment duties.

In a May 7, 2013 report, Sherri Robtoy, a physician's assistant, noted diagnoses of cervical radiculitis, cervical strain and bilateral carpal tunnel syndrome. She related appellant's complaints of neck, bilateral parascapular and right arm symptoms. Appellant denied any radiating arm complaints, fine motor difficulties, or gait disturbance. Upon examination, Ms. Robtoy observed normal sensation including the arms and hands and nontender cervical/parascapular to palpation. She recommended that appellant continue physical therapy and transition to a home exercise program.

In a handwritten May 22, 2013 note, Dr. David Lastomirsky, an internist, stated that appellant was diagnosed with bilateral carpal tunnel syndrome and was under the care of an orthopedic surgeon. He stated, "This medical condition can be caused by repetitive hand use when using a computer keyboard."

In a May 30, 2013 statement, appellant reported that he had been a manager of customer service since 1994. His duties included using the computer to respond to communications and he worked on the computer about five days a week for an average of five hours per day. Appellant believed that he developed bilateral wrist pain as a result of repetitive use of the computer. He did not have any strenuous or repetitive activities outside of his federal employment, except for occasionally dancing with his wife when invited out to a function and occasionally using the computer to e-mail members of his religious group.

In a decision dated June 17, 2013, OWCP denied appellant's occupational disease claim. It accepted that his duties as a customer service manager involved repetitive hand use and that he was diagnosed with bilateral carpal tunnel syndrome but denied the claim finding insufficient medical evidence to establish that his bilateral hand condition was causally related to factors of his employment.

By letter dated October 9, 2013, appellant submitted a request for reconsideration. He stated that he was resubmitting his questions along with additional information. Appellant noted that his attending physician had referred him to Dr. Stewart Gross, Board-certified in preventive medicine, whose report he submitted.

In an August 9, 2013 report, Dr. Gross reviewed appellant's history and diagnosed bilateral carpal tunnel syndrome, trigger finger of the right little finger, trigger finger of the left thumb, trigger finger of the right thumb and ganglion of the right joint.

In a handwritten October 7, 2013 note, Dr. Lastomirsky stated that appellant continued to undergo treatment for chronic anxiety syndrome, which led to incapacitating palpitations. He noted that appellant was also treated for bilateral carpal tunnel syndrome and cervical radiculitis. Dr. Lastomirsky stated that the conditions made appellant unable to perform his duties because his head and neck conditions caused chronic pain. He recommended that appellant remain out of work until further notice.

By decision dated October 31, 2013, OWCP denied further merit review of appellant's claim finding that the evidence submitted was irrelevant and immaterial to the issue. It noted that the medical evidence failed to address whether his bilateral carpal tunnel syndrome was causally related to his employment duties.

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 by the weight of the reliable, probative and substantial evidence³ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁴ In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁶ 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 -- ISSUE 1

Appellant alleged that he sustained bilateral carpal tunnel syndrome as a result of his employment duties as a customer service manager. OWCP accepted that he worked as a customer service manager. It denied appellant's claim, finding insufficient medical evidence to

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁶ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

establish that his carpal tunnel condition was causally related to factors of his employment. The Board finds that he did not meet his burden of proof to establish that his bilateral carpal tunnel syndrome resulted from his employment.

Appellant submitted handwritten notes from Dr. Lastomirsky, who diagnosed bilateral carpal tunnel syndrome. Dr. Lastomirsky stated that the medical condition could be caused by repetitive use of hands when using a computer keyboard. His opinion, however, that appellant's condition "could be" caused by repetitive hand use is speculative or equivocal in character and is of diminished probative value.⁸ The Board has found that rationalized medical opinion evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician.⁹ Dr. Lastomirsky failed to adequately explain how repetitive use of a computer keyboard caused or contributed to appellant's bilateral carpal tunnel syndrome. His opinion is insufficient to establish appellant's claim. The May 7, 2013 physician's assistant report is also insufficient to establish appellant's claim as a physician's assistant is not a physician as defined under FECA.¹⁰

On appeal, appellant alleges that he sustained an injury over time while employed by the employing establishment. He described the pain in his hands, back and upper neck and related that he worked for more than eight hours a day on a computer. It is well established, however, that an employee's belief of causal relation does not establish the fact of such medical question.¹¹ The issue of causal relationship is a medical question that must be established by probative medical opinion from a physician.¹² Because appellant has not provided such rationalized medical opinion evidence in this case, the Board finds that OWCP properly denied his claim.

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 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹³ OWCP's regulations provide that OWCP may

⁸ *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

⁹ *L.F.*, Docket No. 10-2287 (issued July 6, 2011); *Solomon Polen*, 51 ECAB 341 (2000).

¹⁰ *R.M.*, 59 ECAB 690 (2008); section 8101(2) of FECA provides as follows: the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

¹¹ *See Patricia J. Glenn*, 53 ECAB 159 (2001).

¹² *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *David Apgar*, 57 ECAB 137 (2005).

¹³ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district office.¹⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.¹⁵

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.¹⁶ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁸

ANALYSIS -- ISSUE 2

In a decision dated June 17, 2013, OWCP denied appellant's traumatic injury claim finding that the medical evidence did not establish that his bilateral carpal tunnel syndrome was causally related to factors of his employment. On October 9, 2013 appellant requested reconsideration and submitted an August 9, 2013 report by Dr. Gross, who reviewed appellant's history and noted diagnoses of bilateral carpal tunnel syndrome and trigger finger of the ring little finger and left and right thumb. Appellant also submitted an October 7, 2013 note from Dr. Lastomirsky, who reiterated that he was treating appellant for bilateral carpal tunnel syndrome and cervical radiculitis and explained that he was unable to work because of these conditions.

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. While the reports from Drs. Gross and Lastomirsky were not previously considered, this evidence is not relevant to the underlying issue of causal relationship. The physicians did not address whether appellant's bilateral carpal tunnel syndrome was causally related to his employment as a customer service manager. The submission of evidence that does

¹⁴ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁵ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

not address the relevant issue involved does not constitute a basis for reopening a case.¹⁹ Accordingly, these reports are insufficient to warrant further merit review of appellant's case.

The Board finds that appellant failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. Therefore, OWCP properly refused to reopen his case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that his bilateral carpal tunnel syndrome was causally related to factors of his employment. The Board also finds that OWCP properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 31 and June 17, 2013 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ *J.B.*, Docket No. 13-1830 (issued December 19, 2013); *M.E.*, 58 ECAB 694 (2007); *D'Wayne Avila*, 57 ECAB 642 (2006).