

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

D.E., Appellant

and

DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Bradford, PA, Employer

)
)
)
)
)
)
)
)
)
)
)

Docket No. 14-537
Issued: May 14, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 9, 2014 appellant filed a timely appeal from a September 6, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and a December 23, 2013 nonmerit decision. 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a left shoulder injury in the performance of duty on November 21, 2012; and (2) whether OWCP properly denied his request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 21, 2012 appellant, then a 56-year-old general maintenance foreman, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder sprain that day when he was pulling out a boiler. The handle of his jack came off, causing him to fall back on

¹ 5 U.S.C. § 8101 *et seq.*

his left shoulder.² Appellant notified his supervisor that day of the injury. He first received medical care on December 6, 2012.

By letter dated January 3, 2013, OWCP informed appellant that the evidence of record was insufficient to support his claim. Appellant was advised of the medical and factual evidence needed and was asked to respond to the questions provided in the letter within 30 days.

In a December 6, 2012 medical report, Dr. Damian Horner, Board-certified in internal medicine, reported that appellant complained of left shoulder pain. Appellant attempted to remove a boiler but the jack gave out, causing him to fall back and strike his left shoulder. The incident occurred approximately two weeks prior. Dr. Horner diagnosed pain of the left shoulder joint region and recommended a magnetic resonance imaging (MRI) scan.

In a December 12, 2012 diagnostic report, Dr. Walter H. Kuhnen, a Board-certified diagnostic radiologist, reported that an MRI scan of the left shoulder revealed supraspinatus tendinitis. In a December 14, 2012 report, Dr. Horner reported that the MRI scan of the left shoulder revealed supraspinatus tendinitis and diagnosed enthesopathy, unspecified site.

Rehabilitation treatment notes dated December 29, 2012 to May 20, 2013 were also submitted documenting appellant's treatment for left shoulder pain.

By decision dated September 6, 2013, OWCP denied appellant's claim. It accepted that the November 21, 2012 employment incident occurred as alleged; but found that the medical evidence did not establish that his left shoulder condition was caused by the fall at work.

On September 24, 2013 appellant requested reconsideration of OWCP's decision. He submitted an October 7, 2013 attending physician's report (Form CA-20) from Dr. Horner who provided a diagnosis of supraspinatus tendinitis of the left shoulder. Dr. Horner noted the date of injury as April 25, 2012 and also as December 6, 2012. He checked the box marked "yes" when asked if he believed the condition was caused by the employment incident, noting that on December 6, 2012 the jack gave out and appellant fell backwards on his shoulder.

By decision dated December 23, 2013, OWCP denied appellant's request for reconsideration finding that he did not raise a substantive legal question or included new and relevant evidence. It noted that Dr. Horner's October 7, 2013 report was irrelevant and immaterial as he failed to mention the November 21, 2012 incident and provided two other dates of injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 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

² The Board notes that appellant has filed seven other traumatic injury claims before OWCP, but the record before the Board does not contain any information regarding appellant's other claims.

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, OWCP 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 component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

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. He or she must also establish that such event, incident or exposure caused an injury.⁶ Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.⁷

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on the employee's statements. The employee has not met his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁸

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.⁹ The opinion of the physician must be based on 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

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.

⁶ *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

⁷ *Supra* note 3.

⁸ *Betty J. Smith*, 54 ECAB 174 (2002).

⁹ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to establish that he sustained a left shoulder injury in the performance of duty on November 21, 2012.¹¹

In a December 12, 2012 diagnostic report, Dr. Kuhnen reported that an MRI scan of the left shoulder revealed supraspinatus tendinitis. Dr. Horner's reports addressed the diagnosis of left shoulder supraspinatus tendinitis, but he failed to provide any opinion regarding the cause of appellant's condition. He recounted the incident as described by appellant, but did not address how appellant's left shoulder condition was work related. Dr. Horner did not offer a rationalized opinion on the issue of causal relationship.¹² 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.¹³ 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 relationship between the diagnosed condition and the established incident or factor of employment.¹⁴ Dr. Horner's reports do not meet that standard and are insufficient to meet appellant's burden of proof.

The remaining medical evidence of record is also insufficient to establish causal relationship between appellant's left shoulder supraspinatus tendinitis and the November 21, 2012 employment incident. Dr. Kuhnen's report interpreted diagnostic imaging studies but did not address the cause of appellant's left shoulder condition. The rehabilitation notes merely noted appellant's complaints and treatment but failed to provide any diagnosis or opinion on causal relationship. These reports lack probative value as the author(s) are not identified as physicians.¹⁵

While appellant has established that the November 21, 2012 incident occurred as alleged, the record is without rationalized medical opinion addressing the causal relationship between the

¹⁰ *James Mack*, 43 ECAB 321 (1991).

¹¹ *See Robert Broome*, 55 ECAB 339 (2004).

¹² *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).

¹³ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁴ *See Lee R. Haywood*, 48 ECAB 145 (1996).

¹⁵ Nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA, their opinions regarding diagnosis and causal relationship are of no probative medical value. 5 U.S.C. § 8101(2) of FECA provides that 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. *See also Roy L. Humphrey*, 57 ECAB 238 (2005); *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

accepted November 21, 2012 employment incident and appellant's left shoulder condition. Thus, appellant has failed to meet his burden of proof.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁶ Section 10.608(b) of OWCP 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), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP 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.

The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his September 24, 2013 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. The underlying issue in this case was whether appellant's injury was causally related to the November 21, 2012 employment incident. That is a medical issue which must be addressed by relevant medical evidence.¹⁸

Appellant submitted a Form CA-20 dated October 7, 2013 from Dr. Horner. The Board notes that this report is not relevant to establishing a causal relationship between appellant's left shoulder supraspinatus tendinitis and the November 21, 2012 employment incident. Dr. Horner's report was essentially identical and repetitive of his December 6 and 14, 2012 reports which were previously considered by OWCP. Moreover, Dr. Horner listed two dates of injury, April 25 and December 6, 2012, that do not conform to the November 21, 2012 incident alleged by appellant. The Form CA-20 is irrelevant and immaterial to the issue at hand, whether appellant sustained a left shoulder injury as a result of the November 21, 2012 employment

¹⁶ *D.K.*, 59 ECAB 141 (2007).

¹⁷ *K.H.*, 59 ECAB 495 (2008).

¹⁸ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

incident.¹⁹ Thus, Dr. Horner's October 7, 2013 report is insufficient to reopen the case for review of the merits of appellant's claim.²⁰

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He 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 did not meet his burden of proof to establish that his left shoulder supraspinatus tendinitis is causally related to the accepted November 21, 2012 employment incident. OWCP properly denied appellant's request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2013 decision of the Office of Workers' Compensation Programs is affirmed, as modified. The December 23, 2013 decision is affirmed.

Issued: May 14, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ See *D.B.*, Docket No. 12-376 (issued June 20, 2012).

²⁰ Evidence that repeats or 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).