

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

E.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Akron, OH, Employer**

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**Docket No. 14-1813
Issued: May 15, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2014 appellant, through her attorney, filed a timely appeal of a July 23, 2014 merit 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 to consider the merits of the case.²

ISSUE

The issue is whether appellant has met his burden of proof to establish a left shoulder condition due to factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant appealed this decision to the Board, but the original record submitted by OWCP did not include this decision. In an Order to Complete the Record within 30 Days, dated February 12, 2015, the Board directed OWCP to produce the complete case record. *Order to Complete the Record within 30 Days*, Docket No. 14-1813 (issued February 12, 2015). The Board received the completed record on April 9, 2015.

FACTUAL HISTORY

On December 7, 2011 appellant, then a 46-year-old mail handler, filed an occupational disease claim alleging that he developed left shoulder subacromial impingement, bursitis, fraying of the rotator cuff, and acromioclavicular joint arthropathy due to repetitive motion in the performance of his job duties as a mail handler. He stated that he first became aware of his condition on February 2, 1999 and that he first realized that this condition was due to his work on that date. Appellant stated that his left shoulder condition was documented with his right shoulder injury on February 2, 1999 and that his left shoulder condition had worsened with time.

In a letter dated May 18, 2012, the employing establishment disputed appellant's claim alleging that it was untimely as he first became aware of his left shoulder condition on February 2, 1999 and underwent surgery on August 10, 2011. It further argued that appellant had not submitted sufficient medical opinion evidence to establish a causal relationship between appellant's diagnosed left shoulder condition and his employment duties.

OWCP informed appellant by letter dated May 23, 2012 of the additional factual and medical evidence needed to support his claim. Specifically it noted that appellant had not submitted medical evidence in support of a diagnosed condition.

Dr. John Pinkowski, a Board-certified orthopedic surgeon, performed arthroscopy on appellant's left shoulder on August 10, 2011 to repair left shoulder subacromial impingement, bursitis, minimal fraying of the rotator cuff, acromioclavicular joint arthropathy, and mild fraying of the superior aspect of the subscapularis.

By decision dated July 9, 2012, OWCP found that appellant was a federal employee and had filed a timely claim, but denied his claim as he had not established fact of injury through the submission of factual evidence describing the specific employment duties to which he attributed his condition.

Appellant requested reconsideration on August 3, 2012 through the submission of a form report. He also submitted a factual statement dated August 3, 2012 noting that he began working for the employing establishment in November 1989. Appellant stated that his duties included throwing trays of mail overhead six and a half hours a day. He threw 900 to 1,100 trays a day. In 1995 appellant's duties involved the automation section and he was required to move trays of mail from rollers that were head high. He moved 1,100 to 1,500 trays a day for 6½ hours. Appellant reported that each tray weighed 25 pounds. He stated that after four years both shoulders began troubling him. Appellant filed a claim for his right shoulder on February 2, 1999 and received treatment. His job duties changed in 2003 and he was required to work as a dumper stacking 80-pound hampers into stacks of 3, about 60 hampers a day. In 2012 appellant began driving a tow motor with no overhead lifting.

In a decision dated November 8, 2012, OWCP determined that appellant had established his employment duties and submitted sufficient medical evidence of a diagnosed condition. However, it denied his claim because he had not established a causal relationship between his diagnosed condition and his implicated employment duties.

Appellant, through his attorney, requested reconsideration on February 20, 2013. In a note dated February 14, 2006, Dr. Pinkowski examined appellant due to left shoulder symptoms. He reported appellant's statements that he injured his left shoulder at the same time as he injured his right shoulder at work. Dr. Pinkowski stated, "However, he saw me for his right shoulder. He had pain and discomfort in the right shoulder at that time and the record is silent with regard to the symptoms to the left shoulder at that time." On physical examination appellant's left shoulder demonstrated tenderness over the acromioclavicular joint to palpation with no glenohumeral instability. He also exhibited pain and discomfort with supraspinatus stress testing and resisted external rotation and abduction. Appellant had normal muscle strength. Dr. Pinkowski noted that appellant's symptoms of pain and discomfort in the left acromioclavicular joint were consistent with his history of work injury. He opined that appellant's left shoulder condition was related to his job activities in 1999. Dr. Pinkowski stated, "I feel that with a reasonable degree of medical certainty that it is related to his occupation since it is a similar problem that he had on his right shoulder."

In a note dated July 19, 2012, Dr. Pinkowski noted appellant's left shoulder surgery and continued discomfort. He stated that appellant's shoulder condition was related to repetitive overhead activity at work.

OWCP requested additional information from Dr. Pinkowski by letter dated March 22, 2013. It asked that he provide a statement of whether appellant's work activities directly caused or contributed to his diagnosed left shoulder condition. OWCP further asked that Dr. Pinkowski respond to specific questions and allowed 30 days for a response. No response was received.

By decision dated April 25, 2013, OWCP denied modification of its prior decisions finding that Dr. Pinkowski had failed to identify specific employment factors to which he attributed appellant's condition. It found that he mentioned overuse and attempted to correlate appellant's left shoulder condition to his accepted right shoulder condition but failed to establish a causal connection to the employment factors.

Counsel requested reconsideration on April 24, 2014. He submitted notes from Dr. Jeffrey S. Noble, a Board-certified orthopedic surgeon, dated February 9 and May 20, 1999 discussing arthropathy and mild arthritic changes of the distal clavicle. Dr. Noble stated that appellant was lifting weights and developed pain and discomfort in both shoulders after his workout. Appellant's right shoulder continued to bother him more. He continued to lift weights and aggravated his right shoulder with night pain, crepitation, and intrascapular pain. Counsel also resubmitted Dr. Pinkowski's February 14, 2006 and July 19, 2012 notes.

In a decision dated July 23, 2014, OWCP denied modification of its prior decisions finding that although Dr. Noble's reports were new evidence, this evidence failed to establish any causal relationship between appellant's alleged left shoulder condition and his employment.

LEGAL PRECEDENT

OWCP regulations define an occupational disease as “a condition produced by the work environment over a period longer than a single workday or shift.”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) a 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 evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.⁴

ANALYSIS

Appellant filed an occupational disease claim alleging left shoulder subacromial impingement, bursitis, minimal fraying of the rotator cuff, acromioclavicular joint arthropathy, and mild fraying of the superior aspect of the subscapularis condition as a result of repetitive motion in his position of mail handler. In his narrative statement, he stated those duties began in November 1989 which entailed throwing trays of mail overhead six and a half hours a day. In 1995 appellant’s duties involved the automation section and was required to move 25-pound trays of mail from rollers that were head high. He stated that after four years both shoulders began troubling him.

Dr. Noble examined appellant on February 9 and May 20, 1999 for his left shoulder condition. He stated that appellant was lifting weights and developed pain and discomfort in both shoulders after his workout. These notes do not support appellant’s claim for an employment-related left shoulder condition. Dr. Noble attributed appellant’s left shoulder condition to appellant’s activity of lifting weights rather than to the performance of his duties as a mail handler.

Dr. Pinkowski completed a note on February 14, 2006 and reported appellant’s statements that he injured his left shoulder at the same time as he injured his right shoulder at work in 1999. He noted that he initially treated appellant for his right shoulder and that appellant’s “record is silent with regard to the symptoms to the left shoulder at that time.” Dr. Pinkowski opined that appellant’s symptoms of pain and discomfort in the left acromioclavicular joint were related to his job activities in 1999. He stated, “I feel that with a reasonable degree of medical certainty that it is related to his occupation since it is a similar problem that he had on his right shoulder.” In a note dated July 19, 2012, Dr. Pinkowski noted

³ 20 C.F.R. § 10.5(q).

⁴ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

appellant's left shoulder surgery and continued discomfort. He explained that appellant's shoulder condition was related to repetitive overhead activity at work.

The Board finds that Dr. Pinkowski's reports are not based on a complete factual background and are not sufficiently detailed. Dr. Pinkowski did not mention appellant's history of lifting weights in 1999 described by Dr. Noble. He did not describe the specific overhead activities that appellant performed at work nor the period during which appellant performed these activities. Without a complete factual background including prior history of injury, knowledge of the variety and timing of appellant's employment duties, and an opinion explaining how and why the employment duties, and not lifting weights, caused or contributed to appellant's diagnosed left shoulder condition Dr. Pinkowski's reports are not sufficient to meet appellant's burden of proof.

The Board finds that appellant did not submit the necessary medical opinion evidence based on a complete factual background to establish that his left shoulder condition which began in 1999 was causally related to his employment duties. Without this required medical evidence, appellant has failed to establish that he sustained an occupational left 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.

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish a left shoulder condition due to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 15, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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