United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-1730**
	)	**Issued: April 12, 2011**
DEPARTMENT OF THE ARMY, WOMACK ARMY MEDICAL CENTER, Fort Bragg, NC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 June 17, 2010 appellant filed a timely appeal from a February 8, 2010 merit decision of the Office of Workers' Compensation Programs' denying her occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a right shoulder injury as a result of employment activities.

FACTUAL HISTORY

On July 1, 2009 appellant, then a 48-year-old laundry worker, filed an occupational disease claim alleging that she developed bilateral shoulder pain with right shoulder impingement syndrome and tendinitis as a result of employment activities. The duties she alleged were responsible for her injury included pushing and pulling linen carts weighing

approximately 600 pounds and consolidating partially full carts by transferring heavy linen bags from cart to cart.

By letter dated July 20, 2009, the Office informed appellant that the evidence submitted was insufficient to establish that she had sustained an injury as a result of employment activities. Appellant was advised to submit additional information and evidence, including a physician's report, which contained a diagnosis and explanation as to how her diagnosed condition resulted from the claimed employment activities.

In a May 8, 2009 report, Dr. Stephen Kouba, a Board-certified orthopedic surgeon, noted appellant's complaints of right shoulder and neck pain, which she believed to be a result of her repetitive work activities. Appellant noted that, after she had been out of work for three days, her pain decreased. When she returned to work pushing and pulling heavy carts, the pain increased. Dr. Kouba assessed right shoulder supra involvement with pain, weakness and postural compensation.

Appellant submitted reports from Michelle Roman, a physician's assistant. In an April 29, 2009 report, Ms. Roman stated that appellant began experiencing right shoulder pain two months earlier. She noted that appellant worked in a laundry and performed overhead lifting, which seemed to aggravate her symptoms. Examination of the right shoulder revealed tenderness in the right acromioclavicular (AC) joint extending to the deltoid region, as well as tenderness along the trapezius muscle and throughout the cervical spine. The left shoulder examination revealed tenderness to palpation and full active and passive range of motion. Ms. Roman diagnosed right shoulder pain, AC joint arthritis and rotator cuff tear. In a disability slip bearing an illegible date, she stated that appellant could not return to work until May 4, 2009.

Appellant submitted reports from Tyson Shelton, a physician's assistant, for the period March 20 through August 10, 2009. Mr. Shelton diagnosed right shoulder pain and noted that she had experienced no specific trauma. On July 27, 2009 he diagnosed bilateral knee and lower back pain. On August 3, 2009 Mr. Shelton reported that magnetic resonance imaging (MRI) scans of the knees revealed arthritis and an MRI scan of the back revealed a small disc bulge at L5-S1. On August 10, 2009 he stated that appellant had been a patient at Cape Fear Medical Care for over two years and was originally seen for arm and shoulder pain on March 9, 2009. Appellant's MRI scan revealed significant cuff tendinitis and partial tearing and moderate arthrosis in the AC joints. Mr. Shelton stated that her "shoulder pain could be caused from her repetitive motion."

In a June 10, 2009 report, Monica Mohler, a physician's assistant, diagnosed bilateral shoulder pain with right shoulder impingement syndrome and tendinitis. Examination revealed full range of motion with pain with forward flexion and abduction of the arms bilaterally. There was positive impingement testing of the right arm. On July 8, 2009 Ms. Mohler reported positive impingement tests. Active range of motion testing for the right shoulder revealed forward flexion and abduction of 90 degrees. Testing for the left shoulder revealed flexion and abduction of 110 and 100 degrees, respectively. An MRI scan of the right shoulder reflected significant cuff tendinitis and partial tearing, moderate AC joint arthritis and degenerative tearing of the superior labrum. Ms. Mohler diagnosed bilateral shoulder impingement syndrome with

right shoulder partial tearing and degenerative tear of the superior labrum and stated that appellant was out of work until further notice. She stated that appellant performed repetitive overhead work, which exacerbates the pain.

The record contains physical therapy notes from May 8 through 18, 2009. The record also contains March 12, 2009 reports of an electrocardiogram and an x-ray of the cervical spine, an April 1, 2009 report of an MRI scan of the right shoulder, a June 15, 2009 report of an MRI scan of the left shoulder, July 13, 2009 reports of x-rays of the bilateral knees and a July 30, 2009 report of an MRI scan of the lumbar spine.

Appellant submitted a position description for a laundry worker, which reflected that her job required active physical effort in loading, unloading and arranging linens weighing up to 70 pounds, as well as pushing wheeled carts weighing up to 400 pounds. In an August 17, 2008 statement, she noted that she performed a significant amount of overhead lifting, in addition to pushing and pulling heavy carts and consolidating laundry. Appellant had performed these duties seven hours a day, five days a week since July 2007. On August 28, 2009 the employing establishment stated that she was required to transfer four soiled linen carts per shift from the clinic to the soiled linen room. The carts were wheeled and weighed approximately 450 pounds. Appellant was also required to lift a maximum of seven to eight soiled linen bags per shift overhead, each of which weigh approximately 25 to 30 pounds.

By decision dated September 18, 2009, the Office denied appellant's claim. It found that the evidence supported that the claimed work activities occurred, but that there was no medical evidence providing a diagnosis that could be connected to the accepted duties.

On September 24, 2009 appellant, through her representative, requested reconsideration. On November 19, 2009 appellant's representative advised that she had been unaware that a physician's assistant was not considered a physician under the Federal Employees' Compensation Act. He informed the Office that he was submitting copies of previously submitted medical reports, which had been countersigned by appellant's surgeon, Dr. Stanley Gilbert, a Board-certified orthopedic surgeon.

On August 27, 2009 Dr. Gilbert performed a right shoulder arthroscopy. He noted that he performed rotator cuff repair, subacromial decompression and distal clavicle excision. Dr. Gilbert diagnosed right shoulder pain and impingement syndrome.

Appellant resubmitted copies reports from Ms. Mohler and Ms. Roman. These previously-submitted reports were countersigned by Dr. Gilbert. In a December 2, 2009 disability slip, Dr. Gilbert stated that appellant was unable to work in any capacity.

Appellant submitted a December 9, 2009 duty status report from Dr. Gilbert reflecting a February 1, 2009 date of injury. Dr. Gilbert stated that the injury occurred while she was pushing and pulling laundry carts and lifting linen bags weighing approximately 46 pounds. He diagnosed rotator cuff tear impingement syndrome and AC joint arthritis.

By decision dated February 8, 2010, the Office modified its September 18, 2009 decision to reflect that appellant had submitted evidence of a diagnosed condition in connection with her

claim. It denied the claim, however, on the grounds that the medical evidence failed to establish a causal relationship between the diagnosed condition and the established events.

LEGAL PRECEDENT

An employee seeking benefits under the Act[1] 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[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 medical evidence required to establish causal relationship, generally, is 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] However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[5]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *Id*.

[5] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

ANALYSIS

The Board finds that the case is not in posture for decision regarding whether appellant sustained a right shoulder injury as a result of her employment activities. It is not disputed that she was engaged in repetitive employment activities as a laundry worker, including pushing and pulling heavy linen carts and consolidating partially full carts by transferring heavy linen bags from cart to cart. The Office denied appellant's claim findings that the medical evidence failed to establish a causal relationship between these activities and her diagnosed shoulder conditions. The Board finds that the medical evidence of record is generally supportive that her work activities caused her shoulder conditions.

On August 27, 2009 Dr. Gilbert performed right shoulder rotator cuff repair, subacromial decompression and distal clavicle excision. In a December 9, 2009 duty status report, he stated that appellant sustained a rotator cuff tear impingement syndrome and AC joint arthritis as a result of pushing and pulling laundry carts and lifting linen bags weighing approximately 46 pounds. Dr. Gilbert countersigned June 10 and July 8, 2009 reports from Ms. Mohler, which contained examination findings, a diagnosis of bilateral shoulder pain with right shoulder impingement syndrome and tendinitis and an opinion that appellant's repetitive overhead work exacerbated her pain. He also countersigned an April 29, 2009 report from Ms. Roman, which provided a history of injury, examination findings and a diagnosis of right shoulder pain, AC joint arthritis and rotator cuff tear and that appellant's repetitive overhead lifting seemed to aggravate her symptoms.[6] Although Dr. Gilbert did not explain how appellant's repetitive activities were competent to have caused or aggravated her diagnosed conditions, his reports generally supports a causal relationship between the identified activities and the diagnosed shoulder conditions.

Dr. Kouba related appellant's complaints of right shoulder and neck pain, which she believed to be a result of her repetitive work activities. He assessed right shoulder supra involvement with pain, weakness and postural compensation. Dr. Kouba report does not contain a definitive diagnosis or an opinion as to the cause of appellant's condition. It is, however, consistent with appellant's allegations.

While none of the reports of appellant's attending physicians is completely rationalized, they are consistent in noting that appellant sustained a right shoulder condition. The reports noted an accurate history of her work duties as a laundry worker, addressed diagnostic testing that supported right rotator cuff tendinitis with partial tearing and made findings examination. The evidence is not contradicted by any substantial medical or factual evidence of record. While

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[6] In its September 18, 2009 decision, the Office correctly found that the reports signed by Ms. Mohler and Ms. Roman alone did not constitute probative medical evidence, as physician's assistants do not qualify as "physicians" under the Act. 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 the Act 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). In support of her request for reconsideration, appellant submitted copies of the reports, which were countersigned by Dr. Gilbert. The Board has held that a report of a physicians' assistant which has been countersigned by a medical physician constitutes medical evidence. *See Lyle E. Dayberry*, 48 ECAB 369 (1998).

the reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between her diagnosed conditions and the accepted work factors and are sufficient to require the Office to further develop the medical evidence.[7] The case will be remanded to the Office to obtain a rationalized opinion from a qualified physician as to whether her shoulder conditions are causally related to the identified work activities. After such development as it deems necessary, the Office should issue an appropriate decision in order to protect appellant's rights on appeal.[8]

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant sustained a bilateral shoulder injury as a result of established employment activities.

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[7] *See Virginia Richard, supra* note 5; *see also Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

[8] On appeal, counsel objected to the Office's long delay in ruling on his client's reconsideration request of January 29, 2009, contending that the Office's actions prevented her from submitting additional medical evidence, due to a one-year limitation on filing a request for reconsideration. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. *Larry L. Litton*, 44 ECAB 243 (1992). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Preliminary Processing*, Chapter 2.1602.3(b)(1) (October 2005).

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with the terms of this decision.

Issued: April 12, 2011
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