United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 06-2126**
	)	**Issued: February 8, 2007**
U.S. POSTAL SERVICE, MORGAN PROCESSING & DISTRIBUTION CENTER, New York, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2006 appellant filed a timely appeal from a June 16, 2006 decision by the Office of Workers' Compensation Programs that denied his request for an oral hearing and an April 5, 2006 merit decision that denied his claim for an occupational disease. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

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

FACTUAL HISTORY

On February 1, 2006 appellant, then a 63-year-old mail processor, filed an occupational disease claim alleging that he was exposed to air drafts while at work when postal conveyors were moved. This irritated his previous injury to the neck and lower back region. Appellant

stated that the "post cons" were draft barriers. He noted that he had previously injured his neck and right shoulder during military service. Appellant did not stop work.

In support of his claim, appellant submitted a note from Dr. Jacqueline Friedman, a Board-certified psychologist and neurologist with the Department of Veterans Affairs. Dr. Friedman noted that appellant had degenerative disease of the cervical spine, and that his neck pain was worsened by drafts. She advised that the employing establishment should arrange for a barrier to block drafts from entering appellant's work space.

On February 8, 2006 the Office requested additional information concerning appellant's claim. Specifically, the Office noted that appellant had not clearly identified his claimed condition and that, while Dr. Friedman had stated that he had degenerative disc disease, she did not explain how the condition was related to appellant's employment.

By decision dated April 5, 2006, the Office denied appellant's claim. The Office found that the employment exposure occurred as appellant alleged, but that no medical condition had been diagnosed. Moreover, the medical evidence did not provide a physician's opinion as to how the injury/condition related to appellant's work activity.

Appellant requested an oral hearing by letter postmarked May 10, 2006.

By decision dated June 16, 2006, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office noted that the decision appealed had been issued on April 5, 2006 and that the request for an oral hearing was postmarked more than 30 days later, on May 10, 2006. The Office exercised its discretion and advised appellant to request reconsideration of the merits of his case.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation 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 an injury was sustained in the performance of duty as alleged and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[2] An award of compensation may not be based on surmise, conjecture, speculation or upon the claimant's own belief that there is a causal relationship between his or her claimed injury and his or her employment.[3] To establish a causal relationship, the employee must submit a physician's report, in which the physician reviews the employment factors identified by the employee as causing his condition and, taking these factors into consideration as well as findings upon

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Donald W. Long*, 41 ECAB 142 (1989).

examination of appellant, state whether the employment injury caused or aggravated the diagnosed conditions and present medical rationale in support of that opinion.[4]

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.[5] The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the 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 factors identified by the claimant."[6]

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet his burden of proof to establish that he developed an occupational disease in the performance of duty. The record supports that appellant has certain preexisting neck and back conditions. It is also not disputed that postal conveyors were moved in his workplace. Dr. Friedman's note indicates that appellant was treated for a specific condition, namely degenerative disease of the cervical spine. However, she did not provide a medical narrative explaining how the movement of postal conveyors would cause or contribute to the diagnosed degenerative disease process.

On his notice of occupational disease, appellant indicated that he had previously sustained injuries to the neck and shoulder region during his military service. Dr. Friedman did not explain how appellant's diagnosed condition or prior injuries were aggravated by any employment exposure to air drafts.

Dr. Friedman's report does not render a specific opinion on causal relationship. Rather, she only suggested that the employing establishment take steps to shield appellant from drafts in his work space. However, Dr. Friedman did not provide medical reasoning to support that drafts in appellant's work space either caused or aggravated his cervical condition. She merely noted that appellant claimed that drafts worsened his neck pain. The Board has held that a physician's mere repetition of a claimant's complaints does not constitute a basis for the payment of compensation.[7]

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[4] *Id.*

[5] *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006).

[6] *Michael R. Shaffer*, 55 ECAB 386, 389 (2004), *citing Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *See William A. Archer*, 55 ECAB 674 (2004); *see also Dennis M. Mascarenas*, 49 ECAB 215 (1997).

Dr. Friedman did not render a specific medical opinion on causal relationship based on a complete and accurate medical history and thorough examination.[8] Her opinion is of diminished probative weight in establishing that appellant developed an occupational disease in the performance of duty. Appellant submitted no other evidence, medical or factual, prior to the Office's April 5, 2006 decision.[9]

The Board finds that appellant failed to meet his burden of proof in establishing that he developed an occupational disease in the performance of duty, because the medical evidence was insufficient to establish causal relationship between appellant's condition and factors of his employment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "before review under section 8128(a) of this title, 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."[10] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[11] The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[12]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[13] The Office's procedures, which require the

[8] *Melvina Jackson*, 38 ECAB 443 (1987) (notes factors considered in assessing the weight of medical evidence, including the importance of an accurate and complete medical history); *see also James A. Wyrich*, 31 ECAB 1805 (1980).

[9] On appeal, appellant submitted additional factual and medical evidence. He also stated that his appeal was based on "information not previously presented." The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

[10] 5 U.S.C. § 8124(b)(1).

[11] 20 C.F.R. § 10.615.

[12] 20 C.F.R. § 10.616(a).

[13] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[14]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed. Appellant requested an oral hearing in response to a decision issued on April 5, 2006. His request was dated May 9, 2006 and postmarked May 10, 2006, more than 30 days after the date of issuance of the decision.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by examining appellant's request for an appeal. The Office determined that appellant's case would be best served by his submission of a request for reconsideration along with his new supporting evidence. Accordingly, the Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because appellant failed to file the request within the statutory time frame.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that he developed an occupational disease in the performance of duty, and that the Office properly denied appellant's untimely request for an oral hearing.

[14] *Teresa M. Valle*, 57 ECAB __ (Docket No. 06-438, issued April 19, 2006). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 16 and April 5, 2006 are affirmed.

Issued: February 8, 2007
Washington, DC

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

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

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