United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 08-147**
	)	**Issued: April 17, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Benton Harbor, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 22, 2007 appellant, through his attorney, filed a timely appeal from a February 23, 2007 merit decision of a hearing representative of the Office of Workers' Compensation Programs denying his occupational disease claim. He further appealed an April 24, 2007 nonmerit decision denying his request for reconsideration, an August 9, 2007 merit decision denying his occupational disease claim and an October 10, 2007 nonmerit decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the October 10, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained osteoarthritis caused or aggravated by factors of his federal employment; and (2) whether the Office properly denied his request for a hearing under 5 U.S.C. § 8124.

FACTUAL HISTORY

On June 14, 2006 appellant, then a former 52-year-old part-time flexible city carrier, filed an occupational disease claim alleging that he sustained severely advanced osteoarthritis due to factors of his federal employment. In a statement accompanying his claim, he related that he experienced a sharp pain in his right hip while performing his employment duties. The employing establishment indicated that appellant worked 35.17 hours per week for 12 weeks from August 20 to November 12, 2006, when he was terminated during his probationary period.

An x-ray of appellant's hips, obtained on February 22, 2006, showed moderately advanced left hip osteoarthritis and severely advanced right hip osteoarthritis. The report listed bilateral hip pain as the chief complaint and referenced a prior report of October 2000.

On July 6, 2006 the Office requested additional factual and medical information. Appellant submitted reports from a podiatrist regarding his feet and a March 29, 2006 report from a nurse practitioner. On August 8, 2006 a manager with the employing establishment maintained that she was unaware that appellant experienced physical problems until May 26, 2006. Appellant was terminated during his probationary period "for insufficient work quality and quantity."

By decision dated September 18, 2006, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he sustained osteoarthritis due to his employment duties.

On October 11, 2006 appellant requested an oral hearing and review of the written record. He agreed to a telephone hearing.

In a progress report dated September 26, 2006, Dr. George Kolettis, a Board-certified orthopedic surgeon, discussed appellant's complaints of bilateral hip pain. He diagnosed right worse than left bilateral hip arthritis. Dr. Kolettis noted that appellant had arthritis by x-ray since his early to mid-40s and the physician suspected that he had "some degree of hip dysplasia." He recommended a possible hip replacement.

At the telephone hearing held on January 17, 2007 appellant related that his hip condition began in 1986. He experienced a sharp pain while delivering mail in October 2005. Appellant contended that his work injury adversely affected his opportunities for employment in the future.

By decision dated February 23, 2007, the hearing representative affirmed the September 18, 2006 decision.

On April 10, 2007 appellant requested reconsideration. In a decision dated April 24, 2007, the Office denied his request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review of the claim.

On July 6, 2007 appellant requested reconsideration. He submitted a May 4, 2007 report from a social worker, who noted that appellant experienced stress due to losing his job with the employing establishment. In a report dated May 24, 2007, Dr. Karl Schultz, an orthopedic surgeon, noted that appellant had a long history of hip pain, primarily on the right side. He

believed that it "became bad while he was delivering mail for the [employing establishment] and it was particularly bad due to the number of steps he had to go up and down." Dr. Schultz listed findings on examination and stated, "At the present time, it is clear that [appellant] has arthritis most likely due to cam-type femoroacetabular impingement. While this is a preexisting condition, it certainly was aggravated by his job as a mailman."

By decision dated August 9, 2007, the Office denied modification of its February 23, 2007 decision.

On August 28, 2007 appellant, through his attorney, requested a telephone hearing. By decision dated October 11, 2007, the Office denied the request for a hearing under section 8124. The Office found that, as he had previously requested reconsideration under section 8128, he was not entitled to a hearing as a matter of right. The Office considered the request within its discretion and found that the issue could be equally well addressed by appellant requesting reconsideration and submitting evidence supporting that he sustained an employment-related condition.

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 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 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 on 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;[4] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[5] and (3) medical evidence establishing 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.[6]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[4] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[5] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[6] *Beverly A. Spencer*, 55 ECAB 501 (2004).

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.[7] The opinion of the physician must be based on a complete factual and medical background of the claimant,[8] must be one of reasonable medical certainty[9] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an aggravation of his bilateral hip osteoarthritis due to working as a city carrier from August 20 to November 12, 2006. The Office accepted the occurrence of the claimed employment factors. The issue, therefore, is whether the medical evidence establishes a causal relationship between the claimed conditions and his employment as a letter carrier.

Appellant has not submitted medical evidence sufficient to establish that he sustained an aggravation of his bilateral hip osteoarthritis due to his federal employment duties. He submitted a March 29, 2006 report from a nurse practitioner; however, a nurse is not a "physician" as defined under the Act and thus cannot render a medical opinion.[11] Appellant additionally submitted a May 4, 2007 biopsychosocial assessment from a social worker. Section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.[12] As a social worker is not a "physician" as defined under the Act, the May 4, 2007 report does not constitute competent medical evidence.[13] Appellant also submitted reports from a podiatrist regarding the condition of his feet; however, these reports are not relevant to his claim that he sustained a hip condition due to work factors.

On September 26, 2006 Dr. Kolettis discussed appellant's complaints of bilateral hip pain greater on the right side. X-rays revealed evidence of arthritis when he was in his early to mid-40s. Dr. Kolettis diagnosed right worse than left bilateral hip arthritis and possible hip dysplasia. He did not, however, address the cause of appellant's hip arthritis and possible dysplasia. Dr. Kolettis did not explain how appellant's work as a letter carrier would cause or contribute to the preexisting arthritis condition of the hips. The Board has held that medical

[7] *Conrad Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[8] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[9] *John W. Montoya*, 54 ECAB 306 (2003).

[10] *Judy C. Rogers*, 54 ECAB 693 (2003).

[11] 5 U.S.C. § 8101(2); *Vincent Holmes*, 53 ECAB 468 (2002).

[12] 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB ___ (Docket No. 05-1928, issued November 23, 2005).

[13] *See Phillip L. Barnes*, 55 ECAB 426 (2004).

evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[14]

In a report dated May 24, 2007, Dr. Schultz noted that appellant had a long history of hip pain, particularly on the right side. He attributed appellant's hip pain primarily to going up and down steps while delivering mail for the employing establishment. Dr. Schultz diagnosed preexisting arthritis due to femoroacetabular impingement which he opined was aggravated by work duties. While the physician noted that appellant worked as a letter carrier, he did not provide an accurate employment history of appellant working only 12 weeks for the employing establishment. A medical conclusion based on an inaccurate or incomplete history is of diminished probative value.[15] Additionally, Dr. Schultz did not provide any rationale for his opinion. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.[16] A physician's opinion must be based on a complete and accurate factual and medical background and must be supported by medical rationale.[17]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[18] He must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[19] Appellant failed to submit such evidence and therefore failed to discharge his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title 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."[20]

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[14] *Conrad Hightower*, *supra* note 7.

[15] *Mary J. Summers*, 55 ECAB 730 (2004).

[16] *See Beverly A. Spencer*, *supra* note 6.

[17] *Roger Dingess*, 47 ECAB 123 (1995).

[18] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[19] *Robert Broome*, 55 ECAB 339 (2004).

[20] 5 U.S.C. § 8124(b)(1).

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.[21] The hearing request must be sent within 30 days of the date of the decision for which a hearing is sought and the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[22]

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.[23] The Office's procedures, which require the 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 the Act and Board precedent.[24] Moreover, the Board has held that the Office has the discretion to grant or deny a hearing when the request is for a second hearing on the same issue.[25]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for a telephone hearing. Section 8124(b) of the Act states that, before review under section 8128(a), a claimant for compensation is entitled to a hearing on his claim on a request made within 30 days after the date of the issuance of the decision.[26] Section 10.615 of Office regulations provides that a claimant must not have previously submitted a reconsideration request on the same issue.[27]

By decision dated September 18, 2006, the Office denied appellant's occupational disease claim. He requested an oral hearing on October 11, 2006. On February 23, 2007 following a telephone hearing, an Office hearing representative affirmed the September 18, 2006 decision. On April 10, 2007 appellant requested reconsideration, which the Office denied in an April 24, 2007 nonmerit decision. He again requested reconsideration on July 6, 2007. In an August 9, 2007 merit decision, the Office denied modification of its February 23, 2007 decision. On August 28, 2007 appellant, through his attorney, requested another oral hearing and specified that he preferred a telephone hearing. As he had previously requested reconsideration, he was not entitled to a hearing as a matter of right.[28] The Board finds that the Office properly exercised its discretion in denying appellant's request for a telephone hearing and determining that he

[21] 20 C.F.R. § 10.615.

[22] 20 C.F.R. § 10.616(a).

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

[24] *Teresa M. Valle*, 57 ECAB ___ (Docket No. 06-438, issued April 19, 2006).

[25] *See Steven A. Anderson*, 53 ECAB 367 (2002).

[26] *See* 5 U.S.C. § 8124(b).

[27] 20 C.F.R. § 10.616(a).

[28] *Id.* Appellant also was also not entitled to an oral hearing as he had previously received a hearing on the same issue. *See Steven A. Anderson*, *supra* note 25.

could equally well pursue his claim through the reconsideration process.[29] There is no evidence that the Office abused its discretion in denying his request for an oral hearing.

CONCLUSION

The Board finds that appellant has not established that he sustained osteoarthritis caused or aggravated by factors of his federal employment. The Board further finds that the Office properly denied his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 10, August 9, April 24 and February 23, 2007 are affirmed.

Issued: April 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[29] *See Mary E. Hite*, 42 ECAB 641 (1991).