United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 09-387**
	)	**Issued: August 13, 2009**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 24, 2008 appellant filed a timely appeal from a September 4, 2008 nonmerit decision of the Office of Workers' Compensation Programs' and a May 27, 2008 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on July 10, 2007; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On November 23, 2007 appellant, a 53-year-old water treatment plant operator, filed a traumatic injury claim (Form CA-1) for right shoulder and rotator cuff injuries. He attributed his injuries to a July 2007 incident when he experienced pain in his right shoulder while performing

his daily work tasks. Appellant noted that he experienced the most pain while climbing the tank ladder at Building 851 on July 10, 2007.

Appellant submitted physical therapy reports as well as a personal note from a coworker. The coworker, a utility foreman, stated that he was aware of appellant's accident, but was not informed until about two months later, the pain in his shoulder got worse, at which time they decided to report the injury to the base dispensary.

Appellant also submitted an undated personal note in which he described his injury and how it occurred. He alleged that he was injured on July 10, 2007, while climbing a ladder on a water tank, he slipped and, to avoid falling, caught himself. Appellant alleged that he felt a slight snap in his right shoulder. He alleged that he did not report his injury at first because he experienced no immediate adverse effects. In August or September 2007, appellant reported experiencing pain in his shoulder and reduced range of motion, at which point he sought medical attention. He also noted that he has filed other workers' compensation claims concerning his right bicep and left shoulder.

Appellant also submitted a personal statement, dated February 10, 2008 in which a coworker stated it was "[his] understanding [that appellant] was injured sometime in July 2007 on the job." Another coworker reported that although he did not witness the injury, he was aware of where it occurred and witnessed "first hand his right shoulder getting worse, since July 2007."

By decision dated March 11, 2008, the Office accepted that the incident occurred as alleged, but denied appellant's claim because the medical evidence of record was insufficient to establish that he sustained an injury as defined by the Federal Employees' Compensation Act.

Appellant disagreed and requested reconsideration.

In support of his reconsideration request, appellant submitted a November 9, 2007 report signed by Dr. B. Thomas Watson who diagnosed right rotator cuff tear with secondary weakness in his bicep tendon from a previous injury. Dr. Watson noted that his medical history was positive for left rotator cuff and bicep repair. In a January 2, 2008 medical report, he reported that appellant's impingement had improved. Dr. Watson noted that appellant reported while pouring coffee he went to catch the cup with his right arm and felt something snap into the right position and that his pain level since was remarkably decreased. On February 11, 2008 he reported that the shoulder injury was resolving but had not resolved itself completely. In a subsequent medical note, dated March 19, 2008 Dr. Watson reported that appellant had a work-related injury to his shoulder that initially appeared similar to his significant cuff tear on his opposite side.

By decision dated May 27, 2008, the Office accepted that appellant had established the alleged incident but that the claim remained denied because he had not established causal relationship between the diagnosed conditions and the accepted incident.

Appellant disagreed and requested reconsideration. He requested that his previous injury claims, an August 1, 2001 right bicep tear and a June 14, 2004 left shoulder injury, both of which required surgery, be reviewed for relevant and pertinent evidence not yet considered. Appellant

asserted that the statements from his supervisor, coworker and Dr. Watson demonstrated awareness of his previous injuries.

In support of his reconsideration request, appellant submitted a duplicate copy of a coworker's personal statement and a notice of recurrence (Form CA-2), dated October 2, 2007, concerning his August 1, 2001 right bicep tear. That claim was denied on December 10, 2007 because he failed to submit sufficient evidence in support of his claim.

By decision dated September 4, 2008, the Office denied reconsideration of its May 27, 2008 decision.[1]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty

[1] On appeal, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision). As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal.

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *See G.T.*, *supra* note 4; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

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 employee.[7]

ANALYSIS -- ISSUE 1

Appellant filed a compensation claim for right shoulder and rotator cuff injuries due to a July 10, 2007 incident, while climbing a tank ladder, he slipped on a step. Appellant's burden is to establish, through the production of reliable, probative and substantial evidence that his alleged injuries were causally related to the identified employment incident.

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[8] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

The relevant medical evidence of record consisted of reports signed by Dr. Watson. But these medical reports are of little probative value as they lack an opinion on the causal relationship between the identified employment incident and a diagnosed condition. The Board has consistently held that medical opinions lacking an opinion on causal relationship are of little probative value.[10] As none of Dr. Watson's reports proffered an opinion on causal relationship, they are of little probative value and, therefore, are insufficient to meet appellant's burden of proof. Although Dr. Watson diagnosed right rotator cuff tear with secondary weakness in his bicep tendon, he did not provide an opinion explaining how appellant's fall on July 10, 2007 would have caused this condition.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[11] The Board has held that the fact that a condition manifests itself

[7] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[9] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[10] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). *See also*, *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[11] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007)*; Ruth R. Price*, 16 ECAB 688, 691 (1965).

or worsens during a period of employment[12] or that work activities produce symptoms revelatory of an underlying condition[13] does not raise an inference of causal relationship between the two.

The physical therapy reports are of no probative medical value. Because healthcare providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence.[14] Thus, the physical therapy reports appellant submitted are of no probative medical value and are insufficient to meet his burden of proof

As there is no probative medical evidence of record, appellant has not established that he sustained an injury in the performance of duty on July 10, 2007.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[15] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[16] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[17] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[18]

ANALYSIS -- ISSUE 2

The Office is required to reopen a case for merit review if an application for reconsideration or an appellant demonstrates that the Office erroneously applied a specific point of law, presents a new relevant legal argument or puts forth relevant and pertinent new evidence. Appellant did not argue that the Office erroneously applied a point of law, nor did he advance a new legal argument not previously considered by the Office. Therefore, he was not entitled to a merit review based upon the first two enumerated grounds noted above.

---

[12] *E.A.*, 58 ECAB ___ (Docket No. 07-1145, issued September 7, 2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[13] *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007); *Fabian Nelson*, 12 ECAB 155,157 (1960).

[14] 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

[15] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b)(2).

[17] *Id*. at § 10.607(a).

[18] *Id*. at § 10.608(b).

Concerning the third requirement, submission of relevant and pertinent new evidence not previously considered by the Office, appellant submitted a duplicate copy of an undated personal note from one of his coworkers. This evidence was already of record and, therefore, furnishes no grounds for the Office to reopen his claim for merit review. Evidence that duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[19]

Appellant also submitted an incomplete copy of a notice of recurrence (Form CA-2a). However, this document does not constitute relevant or pertinent new evidence as it pertained to an unrelated workers' compensation claim, his August 1, 2001 right bicep tear, which the Office denied because there, as here, he failed to submit sufficient evidence in support of his claim.

Because appellant has not satisfied any of the above-mentioned criteria, the Board finds that the Office properly refused to reopen his case for further review of the merits of his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on July 10, 2007. The Board also finds that the Office properly declined to reopen his claim for further merit review.

[19] *James W. Scott*, 55 ECAB 606 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 4 and May 27, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board