United States Department of Labor
Employees' Compensation Appeals Board

F.T., Appellant	)	
and	)	**Docket No. 09-2145**
	)	**Issued: February 25, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Medford, OR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 26, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated March 13 and August 12, 2008 denying her occupational disease claim, the nonmerit decision dated December 1, 2008 denying her request for reconsideration and the nonmerit decision dated March 11, 2008 denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing; (2) whether appellant met her burden of proof to establish that she sustained an occupational injury in the performance of duty; and (3) whether the Office properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 30, 2006 appellant, then a 39-year-old mail processing clerk, filed an occupational disease claim alleging that she had headaches and pain in her shoulders and neck as a result of her employment activities. She stated that she first became aware that her condition was related to conditions of employment on January 11, 2006.[1] On April 6, 2006 appellant requested light duty "due to current condition."

Appellant submitted illegible notes and work excuses from Dr. Michael E. Thomas, a treating physician. On April 19, May 11 and 19, 2006 Dr. Thomas opined that appellant was able to return to work light duty.

Appellant was treated by Dr. John Sager, a Board-certified family practitioner. In disability slips dated February 23 through May 22, 2006, he indicated that appellant was unable to work or required light duty due to an injury-related medical condition.

The record contains an "Employee Injury Display" dated January 22, 2007 reflecting the following reported injuries: January 11, 2006 -- neck, shoulders, overuse; March 9, 2006 -- strain, lower to upper back and June 13, 2006 -- right hand, wrist pain/repetitive work. The record also contains an illegible employing establishment incident report dated March 9, 2006.

On March 6, 2007 the Office informed appellant that the evidence submitted was insufficient to establish her claim. It advised her to submit a detailed narrative identifying which work events allegedly caused her claimed conditions, as well as a physician's report with a diagnosis and an opinion explaining how those work activities caused the diagnosed conditions.

In an April 11, 2007 decision, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she had sustained an injury in the performance of duty. It stated that appellant had failed to identify which work events had caused her claimed injuries.

Appellant requested an oral hearing. In a letter dated August 20, 2007, the Branch of Hearings and Review notified appellant that an oral hearing had been scheduled for September 25, 2007. The notice was sent to appellant's address of record. Appellant failed to appear for the scheduled hearing. By decision dated October 23, 2007, an Office hearing representative found that appellant had abandoned her request for a hearing, as she failed to appear or explain why she did not appear. Appellant was informed that, if she disagreed with the October 23, 2007 decision, she could appeal the decision to the Board.

On January 5, 2008 appellant again requested an oral hearing. She contended that she had not received notice of the original hearing scheduled for September 25, 2007. In a decision dated March 11, 2008, the Branch of Hearings and Review denied appellant's hearing request.

[1] Appellant's June 19, 2006 occupational injury claim (File No. xxxxxx628; date of injury June 13, 2006) was accepted for bilateral sprain and tenosynovitis of hand and wrist, and bilateral sprain of elbow and forearm. Her occupational disease claim for a back condition (File No. xxxxxx291; date of injury March 9, 2006) was denied.

Appellant submitted an August 16, 2007 report from Dr. David Galt, a Board-certified orthopedic surgeon, who treated her for right shoulder pain. Dr. Galt stated that she had myofascial symptoms affecting the right shoulder girdle, radiating into the neck. He described her pain as minimal when she was not working, but he noted that she did work in a modified position.

In a June 27, 2006 report, Dr. Howard Shoemaker, Board-certified in the area of occupational medicine, who diagnosed bilateral arm strain with features of tendinitis, neuritis and myositis. Appellant informed him her injury occurred on June 13, 2006 as a result of working the DB machine, which involves repetitive feeding of 25-pound mail trays. She had a gradual onset of right arm pain and now that she has been splinting her right arm the same symptoms are occurring on her left arm. Appellant informed Dr. Shoemaker that her current arm pain, from the elbows to the fingers, was different from her previous job-related upper back and neck complaints. She noted that achiness throughout both arms was aggravated by her work activities, which required her to do repetitive work 12 hours per day, 6 days per week, pushing up to 1,500 pounds, lifting boxes, sorting 75-pound bags of mail. Dr. Shoemaker attributed appellant's symptoms to generalized overuse, noting that inflammation was affecting tendons, muscles and nerves. He indicated that she had no specific entrapments, but had features of ulnar neuritis and media nerve neuritis along with general myositis and mild tendinitis. Dr. Shoemaker recommended that she seek a modified work schedule or a different job.

Appellant submitted a January 22, 2008 report from Dr. Duenther Knoblich, a Board-certified orthopedic surgeon. His history of injury reflected that related appellant's neck and shoulder pain began in 2006 while she was working at the employing establishment, and worsened through January and March 2006 due to her mail processing activities and lifting pallets of mail. Appellant complained of patchy numbness in her hand, which she stated was not related to neck position and did not radiate from her neck into her hand. Dr. Knoblich provided examination findings, which revealed full range of motion in the neck, except for flexion. Appellant had paraspinous tenderness on the right side as well as trapezial tenderness; AC joint tenderness; subacromial tenderness and mildly positive impingement signs. There was positive cross-body adduction with pain referred to the AC joint. The rotator cuff was strong. Range of motion was 110 degrees active abduction and 170 degrees passive abduction; 150 degrees active forward flexion and 180 degrees passive forward flexion; lift-off test and Napoleon sign showed an intact subscapularis. Appellant had full extension and bicipital groove tenderness. A May 30, 2007 MRI scan of the shoulder revealed evidence of a possible calcific tendinitis of the distal supraspinatus tendon, but no evidence of tendinosis or supraspinatus tear. There were degenerative changes in the AC joint producing impressive impingement on the supraspinatus, as well as minimal subcortical cystic changes of the humeral head. An April 20, 2007 MRI scan of the cervical spine showed minor paracentrical intraforaminal disc bulges at C4-5 and C5-6, leading to mild to moderate right-sided neuroforaminal narrowing at the exiting C5 nerve root, as well as lesser evidence of foraminal narrowing. Dr. Knoblich diagnosed impingement syndrome; AC joint arthritis; degenerative disc disease of the cervical spine.

The record contains a February 5, 2008 disability slip from Dr. Thomas J. Purtzer, a Board-certified neurologist, who stated that appellant should be excused from work for the "next month" in order to evaluate and treat her right arm condition.

In March 13, 2008 decision, the Office denied modification of its April 11, 2007 decision, finding that appellant had failed to establish the fact of injury. It stated that appellant had not identified any specific employment factors she believed to have caused or contributed to her claimed condition. On March 13, 2008 appellant requested reconsideration.[2]

In a February 20, 2008 report, Dr. Purtzer stated that he began treating appellant on December 13, 2006 for bilateral arm pain resulting from a June 13, 2006 injury. He recommended that her claim be accepted for right shoulder or arm pain, as her lower back and neck pain had resolved by the time he began treating her. Dr. Purtzer also opined that appellant had developed significant depression due to her chronic pain. In disability slips dated February 5 and 28, and April 1, 2008, he stated that appellant should be "off work" for a month in order to allow for her right arm pain to resolve.

By decision dated April 24, 2008, the Office denied appellant's request for merit review. On May 6, 2008 appellant again requested reconsideration.

In a May 6, 2008 statement, appellant described her work activities during the January 11, 2006 timeframe, which included running the DBCS machine for 12-hour shifts. She repeatedly tossed trays of letters weighing 20 to 25 pounds onto a ledge and then pushed the mail continuously through a machine. Finally, appellant swept the mail into letter trays. He stated that, at the end of December 2006, her neck and shoulder began to hurt "really bad" as a result of her activities on the DBCS machine, and that she reported that fact to her supervisor. On January 11, 2006 she sought treatment from her physician for her continuing neck and shoulder pain. Appellant noted that her duties also included lifting and sorting parcels. She stated, "I believed what I was doing at work either helped, caused, contributed or aggravated the neck/shoulder injury."

In a May 23, 2008 report, Dr. Purtzer diagnosed chronic pain syndrome and situational depression and opined that appellant's right shoulder and arm pain was directly caused by employment activities, including the repetitive use of her right arm and grabbing objects. He noted that, when she was taken off of work, the arm pain markedly decreased, and that when she returned to work, the pain resumed. Dr. Purtzer repeated the history of injury, noting that her shoulder pain began in June 2006 when she was running a DBCS machine. He stated that appellant was not able to perform any type of work that irritates her right shoulder and arm.

In an August 12, 2008 decision, the Office denied modification of its previous decisions.

On October 5, 2008 appellant requested reconsideration. She submitted a letter from the Portland Health and Resource Management Division dated July 30, 2008, an August 7, 2008 statement signed by Mark Smith, of the employing establishment, the front page of an accident worksheet dated June 30, 2006, a copy of an unsigned request for reconsideration and a statement dated November 17, 2008 from the claimant regarding her banking information. The Office also received the following duplicate information: a copy of Form CA2; statements from

[2] Appellant's appeal request form actually reflects that she was requesting reconsideration in File No. xxxxxx628; however, the Office apparently treated it as a request for reconsideration in the instant case, as it issued a decision on the request on April 24, 2008.

the claimant requesting light duty dated March 4 and April 3, 2006; copies previous decisions; a copy of the April 20, 2007 report of the MRI scan of the cervical spine; a copy of a letter from Dr. Thomas Purtzer dated February 20, 2008; a copy of the claimant's May 6, 2008 statement; and a copy of the Office's July 23, 2008 letter.

By decision dated December 1, 2008, the Office denied appellant's request for merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant 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.[3] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[4] 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.[5] Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.[6]

The Act provides the Office with original jurisdiction in the processing of compensation claims, and section 8124(a) provides the Office with the duty and authority to issue an initial decision on an employee's claim for compensation.[7] Once an initial decision is made in a compensation case, the claimant's rights arise by which the claimant may seek further review of his claim: the right to a hearing before the Office, the right to reconsideration before the Office or an appeal to the Board. The Office's Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Director.[8]

ANALYSIS -- ISSUE 1

The Office issued a decision on April 11, 2007 denying appellant's occupational disease claim. In response to a timely request for an oral hearing, the Branch of Hearings and Review notified appellant that an oral hearing had been scheduled for September 25, 2007. In a decision dated October 23, 2007, an Office hearing representative found that appellant had abandoned her

[3] 5 U.S.C. § 8124(b)(1).

[4] 20 C.F.R. §§ 10.616-17.

[5] *Claudio Vasquez*, 52 ECAB 496 (2002).

[6] *See Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

[7] 5 U.S.C. § 8124(a).

[8] *Robert N. Thomas*, 51 ECAB 180, 180-81 (1999).

request for a hearing, as she failed to appear or explain why she did not appear at the scheduled hearing. On January 5, 2008 appellant again requested an oral hearing, contending that she had not received notice of the original hearing scheduled for September 25, 2007. In a decision dated March 11, 2008, the Branch of Hearings and Review denied her hearing request. The Board finds that the Branch of Hearings and Review properly denied appellant's January 5, 2008 request for an oral hearing.

Section 8124(b) states that a claimant not satisfied with a formal decision of the Office is entitled to a hearing by an Office hearing representative if the request is made within 30 days of the date of the decision. However, the Board has clarified that claimants do not have the right under section 8124(b)(1) of the Act to a hearing in the absence of a final Office decision.[9] In this request for a hearing, appellant was not seeking review of a final adverse decision of the Office. Rather, her January 5, 2008 letter requested a hearing on the October 23, 2007 decision of the hearing representative, which found that she had abandoned her hearing request. Appellant had no right to a hearing of the nonmerit decision by the hearing representative, as it was not a final decision of the Office over which the Branch of Hearings and Review could assume jurisdiction to exercise its discretionary appellate authority. Therefore, appellant's only right of appeal was to the Board. The Board notes that the October 23, 2007 decision clearly informed appellant that she had only the right to appeal the abandonment decision to the Board. However, appellant failed to do so within the appropriate time limitation. As she was not entitled to an oral hearing on the October 23, 2007 nonmerit decision, the Board concludes that the Branch of Hearings and Review properly denied the request.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Federal Employees' Compensation Act[10] has the burden of establishing the essential elements of her claim, including the fact that an injury was sustained in the performance of duty as alleged,[11] and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[12]

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 the 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

[9] *Robert N. Thomas*, *supra* note 8; *Eileen A. Nelson*, *supra* note 6.

[10] 5 U.S.C. §§ 8101-8193.

[11] *Joseph W. Kripp*, 55 ECAB 121 (2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). "When an employee claims that he sustained injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and manner alleged. He must also establish that such event, incident or exposure caused an injury." *See also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. § 10.5(q) and (ee) (2002) ("Occupational disease or Illness" and "Traumatic injury" defined).

[12] *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

diagnosed condition is causally related to the employment factors identified by the claimant.[13] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e.*, medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to claimant's diagnosed condition. To be of probative value, 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.[14]

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for a decision as to whether appellant sustained an occupational injury in the performance of duty.

In its April 11, 2007 and March 13, 2008 decisions, the Office found that appellant had failed to establish the fact of injury, as she had not identified specific work events she believed to have caused or contributed to her claimed condition. On August 12, 2008 it denied modification of its previous decisions. The evidence of record, however, contains a factual statement dated May 6, 2008 in which appellant identified the employment factors alleged to have caused or contributed to her claimed neck and shoulder conditions. Appellant described her work activities during the January 11, 2006 time frame, which included running the DBCS machine for 12-hour shifts, tossing trays of letters weighing 20 to 25 pounds onto a ledge and then pushing the mail continuously through a machine, and sweeping the mail into letter trays. She noted that her duties also included lifting and sorting parcels. Appellant stated, "I believed what I was doing at work either helped, caused, contributed or aggravated the neck/shoulder injury." The Board finds that she has identified specific employment activities alleged to have caused her claimed condition. Therefore, the issue is whether the medical evidence is sufficient to establish that a diagnosed condition is causally related to the employment factors identified by the appellant.[15]

Medical evidence of record supports a causal relationship between appellant's neck and shoulder conditions and her employment activities. Dr. Shoemaker diagnosed bilateral arm strain with features of tendinitis, neuritis and myositis. He described in detail appellant's work duties, which involved repetitive feeding of 25-pound mail trays on the DBCS machine and opined that these duties contributed to her diagnosed condition. Dr. Shoemaker attributed appellant's symptoms to generalized overuse, noting that inflammation was affecting tendons, muscles and nerves. He indicated that she had no specific entrapments, but had features of ulnar neuritis and media nerve neuritis along with general myositis and mild tendinitis. Dr. Shoemaker recommended that she seek a modified work schedule or a different job.

Dr. Purtzer diagnosed chronic pain syndrome and situational depression and opined that appellant's right shoulder and arm pain was directly caused by employment activities, including

[13] *Michael R. Shaffer*, 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

[14] *Leslie C. Moore*, 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

[15] *Michael R. Shaffer*, 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

the repetitive use of her right arm and grabbing objects. He noted that, when she was taken off work, the arm pain markedly decreased, and that when she returned to work, the pain resumed. Dr. Purtzer noted that her shoulder pain began in June 2006 when she was running a DBCS machine.

Dr. Knoblich stated that appellant's neck and shoulder pain began in 2006 while she was working at the employing establishment, and worsened through January and March 2006 due to her mail processing activities and lifting pallets of mail. After providing detailed examination findings and a review of the medical record, he diagnosed impingement syndrome; AC joint arthritis and degenerative disc disease of the cervical spine.

Dr. Galt reported that appellant had myofascial symptoms affecting the right shoulder girdle, radiating into the neck. He noted that her pain was worse when she was working.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[16] Although the reports from appellant's treating physicians do not contain sufficient rationale to discharge her burden of proving by the weight of the reliable, substantial and probative evidence that her neck and shoulder conditions were caused by the identified employment activities, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[17] The Board will remand the case for further development of the medical evidence.

On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether her neck and shoulder conditions were caused by the specified employment activities. After such development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

CONCLUSION

The Board finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing. The Board further finds that the case is not in posture for a decision as to whether appellant sustained an occupational disease in the performance of duty.[18]

[16] *William J. Cantrell*, 34 ECAB 1223 (1983).

[17] *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[18] In light of the Board's ruling on the second issue, the third issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 11, 2008 decision is affirmed. It is further ordered that the Office's August 12 and March 13, 2008 decisions are set aside and remanded for action consistent with the provisions of this decision.

Issued: February 25, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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