United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 07-1612**
	)	**Issued: November 13, 2007**
U.S. POSTAL SERVICE, DELAWARE PROCESSING & DISTRIBUTION CENTER, Wilmington, DE, 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 May 23, 2007 appellant filed a timely appeal from a November 2, 2006 decision of the Office of Workers' Compensation Programs that denied her request for reconsideration and an October 16, 2006 decision that denied her occupational disease claim. 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 her burden of proof in establishing that she developed an occupational disease in the performance of duty; and (2) whether the Office properly denied appellant's reconsideration request without conducting further merit review.

FACTUAL HISTORY

On March 14, 2006 appellant, then a 40-year-old dispatch clerk, filed an occupational disease claim alleging that she developed left arm pain in the performance of duty.[1] She did not stop work.

In support of her claim, appellant provided a physical therapy prescription form from Dr. David Sowa, a Board-certified orthopedic surgeon. In a March 23, 2006 duty status report, Dr. Sowa noted findings of cervical radiculopathy and listed appellant's work restrictions. In a March 23, 2006 examination report, he indicated that appellant had "cervical radicular complaints in the bilateral upper extremities," which she related to "overuse activities at work."

On August 7, 2006 the Office advised appellant of the evidence needed to establish her claim.

On September 19, 2006 Dr. Peter F. Townsend, a Board-certified orthopedic surgeon, performed a physical examination. He noted appellant's complaints of right wrist pain with radiation to the shoulder, pain in the shoulder and paresthesias in her long and ring fingers, "which are exacerbated by her activities at work." Dr. Townsend diagnosed shoulder bursitis and impingement syndrome. In an accompanying note, he indicated that appellant's job as a mail processor required her to throw bundles of magazines. Dr. Townsend prescribed an electromyogram (EMG) to rule out carpal tunnel syndrome as well as physical therapy. Appellant provided physical therapy notes.

By decision dated October 16, 2006, the Office denied appellant's occupational disease claim, finding that she had not met her burden of proof in establishing a causal relationship between her diagnosed condition and factors of her employment.

Appellant requested reconsideration on October 25, 2006. She provided additional copies of Dr. Townsend's physical therapy prescription notes and notes from her physical therapist.

By decision dated November 2, 2006, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 disabilities and/or specific

[1] Appellant actually filed a claim for recurrence of disability. However, the Office determined that the matter would be more properly developed as a new occupational disease claim. Appellant's previous claim involved a rash to the arm and was closed in 2000.

[2] 5 U.S.C. §§ 8101-8193.

conditions for which compensation is claimed are causally related to the employment injury.[3] 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.[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]

An award of compensation may not be based on surmise, conjecture, speculation or upon a claimant's own belief that there is a causal relationship between his or her claimed injury and his or her employment.[7] To establish a causal relationship, a claimant must submit a physician's report, in which the physician reviews the employment factors identified by appellant as causing her condition and, taking these factors into consideration as well as findings upon examination of appellant and her medical history, states whether the employment injury caused or aggravated her diagnosed conditions and presents medical rationale in support of his or her opinion.[8]

ANALYSIS -- ISSUE 1

The record reflects that appellant performed certain repetitive activities utilizing the upper extremities in her position as a dispatch clerk. The Board finds that appellant has not met her burden of proof in establishing that factors of her employment caused her cervical condition.[9]

Appellant submitted a March 23, 2006 duty status report and examination notes from Dr. Sowa. In his duty status report, Dr. Sowa did not provide a specific opinion on causal relationship. The Board has held that a medical report that does not include an opinion on causal

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

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

[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*, *supra* note 4.

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

[8] *Id.*

[9] After issuance of the Office's November 2, 2006 decision and also on appeal, appellant submitted additional medical evidence. 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 a 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).

relationship is not probative on that issue.[10] In his examination notes, Dr. Sowa stated that appellant related her symptoms to overuse activities performed on the job. However, he did not provide his own reasoned opinion on causal relationship based on physical examination and diagnostic testing but instead appears to have merely repeated what appellant related.[11] Accordingly, the Board finds that Dr. Sowa's reports do not establish a causal relationship between appellant's job duties and her diagnosed condition.

Appellant also provided a September 19, 2006 report and several prescription forms from Dr. Townsend. The prescriptions for an EMG and physical therapy did not include an opinion on causal relationship and consequently are of no probative value on that issue.[12] In his September 19, 2006 report, Dr. Townsend diagnosed shoulder bursitis and impingement syndrome, which he stated was exacerbated by appellant's work activities. Although he did provide support for causal relationship, the Board finds that his opinion is insufficient to establish that appellant's job duties caused her diagnosed condition because he did not support his opinion with rationale or a detailed explanation of how appellant's job caused her shoulder bursitis and impingement. Dr. Townsend did not enumerate which specific job activities exacerbated appellant's condition, explain why they exacerbated her condition or provide reasoning to support his conclusions. In his accompanying note, he indicated that appellant's job duties included throwing bundles of magazines. However, Dr. Townsend did not explain how this particular job duty caused appellant's diagnosed shoulder bursitis and impingement. Therefore, the Board finds that his September 19, 2006 report lacks sufficient rationale to support her occupational disease claim.

The Board notes that appellant also submitted physical therapy notes. However, a physical therapist is not a physician within the Act's definition[13] and, as causal relationship is a medical question that can generally be decided only by competent medical evidence,[14] the physical therapy notes are of no probative value in establishing the claim.

Consequently, appellant has not met her burden of proof in establishing her claim.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing

[10] *See, e.g., Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[11] *See Laurie S. Swanson*, 53 ECAB 517 (2002) (a physician's statement regarding a claimant's ability to work consisting primarily of a repetition of the claimant's complaints is not a basis for payment of compensation).

[12] *See supra* note 10.

[13] *See Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988).

[14] *Steven S. Saleh*, 55 ECAB 169 (2003).

federal regulations provides guidance for the Office in using this discretion.[15] The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[16]

Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[17] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[18]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's claim without conducting a merit review because appellant failed to meet any of the above-listed criteria. With her reconsideration request, appellant did not present any additional information; she did not show that the Office erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument.

In support of her request, appellant provided an additional copy of Dr. Townsend's September 19, 2006 physical therapy prescription and of her physical therapy notes. As this evidence had previously been received and considered by the Office, it was not new evidence and did not constitute a basis for reopening the claim.[19] Thus, the Office properly denied appellant's reconsideration request.

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[15] 20 C.F.R. § 10.606(b)(2).

[16] *Id.*

[17] *Id*. at § 10.608(b).

[18] *Annette Louise*, 54 ECAB 783 (2003).

[19] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she developed an occupational disease in the performance of duty and that the Office properly denied her request for reconsideration without conducting a merit review.

ORDER

IT IS HEREBY ORDERED THAT the November 2 and October 16, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 13, 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