United States Department of Labor
Employees' Compensation Appeals Board

GUY A. CASTRO, Appellant	)	
and	)	**Docket No. 06-425**
	)	**Issued: April 7, 2006**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Federal Way, WA, Employer	)	

Appearances:
Guy A. Castro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 13, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 15, 2005 merit decision denying his occupational disease claim and the October 7, 2005 nonmerit decision denying his request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a right shoulder injury in the performance of duty; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

FACTUAL HISTORY

On April 10, 2005 appellant, then a 53-year-old postal clerk, filed an occupational disease claim alleging that he sustained a right shoulder injury due to his job duties, which included tossing mail flats into cages, stacking mail flats into carts, keying parcels, opening and closing

bay doors with chains, and opening, closing and sealing doors on tractor trailers. Appellant did not stop work but began working in a limited-duty position at the employing establishment.

Appellant submitted a March 3, 2005 form report in which James Bergstrom, a nurse practitioner for the employing establishment, indicated that appellant reported injuring his right shoulder through repetitive motion. Mr. Bergstrom listed a diagnosis of right shoulder sprain and recommended work restrictions. He also submitted an undated note in which "C. Prestianni" indicated that he should not lift more than 20 pounds and should not engage in overhead lifting with his right arm.[1]

By letter dated June 9, 2005, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

By decision dated August 15, 2005, the Office denied appellant's occupational claim on the grounds that he did not establish a compensable employment factor and did not submit medical evidence relating his claimed condition to a compensable employment factor.

By form dated and postmarked September 15, 2005, appellant requested a review of the written record by an Office hearing representative.

By decision dated October 7, 2005, the Office denied appellant's request for a review of the written record by an Office hearing representative. It determined that appellant was not entitled to a review of the written record as a matter of right because his request was untimely. The Office indicated that it had exercised its discretion and denied appellant's request for a review of the written record on the basis that his claim could be addressed through a reconsideration application.[2]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his 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 disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4]

An employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative and substantial

[1] "C. Prestianni" appears to be a nurse practitioner; there is no "C. Prestianni" listed in the reference works which detail physicians and their specialties.

[2] Appellant later submitted another request for a review of the written record by an Office hearing representative and, in a November 23, 2005 informational letter, the Office requested that he refer to the October 7, 2005 decision.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

evidence.[5] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action.[6] An employee has not met his burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[7] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[8] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[9]

The medical evidence required to establish a causal relationship between an accepted employment incident and a claimed medical condition 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. 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.[10]

ANALYSIS -- ISSUE 2

Appellant claimed that he sustained a right shoulder injury due to his job duties, which included tossing mail flats into cages, stacking mail flats into carts, keying parcels, opening and closing bay doors with chains, and opening, closing and sealing doors on tractor trailers. The Office denied his occupational disease claim on the grounds that he did not establish a compensable employment factor and did not submit medical evidence relating his claimed condition to a compensable employment factor.

The Board finds that appellant established that his employment duties included tossing mail flats into cages, stacking mail flats into carts, keying parcels, opening and closing bay doors with chains, and opening, closing and sealing doors on tractor trailers. Appellant reported that he sustained a right shoulder injury due to the performance of these work duties over a period of time. There are no inconsistencies in the evidence as to cast serious doubt upon the validity of

[5] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[6] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[7] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[8] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[9] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[10] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

appellant's claim and his assertions regarding his work duties have not been refuted by strong or persuasive evidence.[11]

The Board finds, however, that appellant did not submit medical evidence showing that he sustained a right shoulder condition due to these accepted employment factors. He submitted a March 3, 2005 form report in which Mr. Bergstrom, a nurse practitioner for the employing establishment, indicated that he reported injuring his right shoulder through repetitive motion of the shoulder, listed a diagnosis of right shoulder sprain, and recommended work restrictions. However, a nurse is not a "physician" within the definitions under the Act and thus cannot render a medical opinion on the causal relationship between a given physical condition and implicated employment factors.[12] Appellant also submitted an undated note in which "C. Prestianni" indicated that he should not lift more than 20 pounds and should not engage in overhead lifting with his right arm. It appears that the individual who signed this note also is a nurse practitioner and therefore the note would not constitute probative medical evidence and would not establish appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision. The Office's regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[13]

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.[14] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[15]

[11] For example, appellant's supervisor did not indicate that appellant did not perform these work duties.

[12] *See Bertha L. Arnold*, 38 ECAB 282, 285 (1986); 5 U.S.C. § 8101(2).

[13] 20 C.F.R. § 10.616(a); *see Michael J. Welsh*, 40 ECAB 994, 996 (1989).

[14] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[15] *See Welsh, supra* note 13 at 996-97.

ANALYSIS -- ISSUE 2

Appellant's September 15, 2005 request for a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision dated August 15, 2005 and, thus, appellant was not entitled to a review of the written record as a matter of right. Appellant requested a review of the written record in a form dated and postmarked September 15, 2005. Hence, the Office was correct in stating in its October 7, 2005 decision that appellant was not entitled to a review of the written record as a matter of right because his request for a review of the written record was not made within 30 days of the Office's August 15, 2005 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its October 7, 2005 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that his claim could be addressed through a reconsideration application. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[16] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a right shoulder injury in the performance of duty. The Board further finds that the Office properly denied appellant's request for a review of the written record.

[16] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 7 and August 15, 2005 decisions are affirmed.

Issued: April 7, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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