



## **FACTUAL HISTORY**

On December 13, 2005 appellant, then a 64-year-old tractor trailer driver, filed a Form CA-2, occupational disease claim, alleging that his left shoulder rotator cuff tear was employment related. He first realized that he had the condition on January 5, 2005 and that it was employment related on March 5, 2005. Appellant stopped work on July 7, 2005. In an attached statement, he contended that surgery he had on the right shoulder on September 29, 2000 for an accepted injury left him with a weaker right arm, which made it difficult to load and unload the trailer. In January 2005, appellant started having increased pain on the left shoulder and was diagnosed with a rotator cuff tear and had surgery on July 7, 2005. In a September 23, 2005 letter, he requested that his May 25, 2000 claim be reopened.<sup>1</sup>

Appellant submitted a left shoulder magnetic resonance imaging scan report dated March 31, 2005 that demonstrated a full thickness tear of the supraspinatus tendon. He also submitted treatment notes from Dr. John M. Fenlin, Jr., a Board-certified orthopedic surgeon, dated July 20 and August 31, 2005. Dr. Fenlin described appellant's postoperative recovery from left shoulder surgery.<sup>2</sup> In a November 2, 2005 note, he advised that appellant first reported on that day that he felt that, following right shoulder surgery in September 29, 2000, he had increasing pain on the left caused by loading and unloading cartons and pallets on a trailer incline, which he felt caused the injury to his left shoulder. Dr. Fenlin advised that appellant's left shoulder repair had been only partial and that he would continue to have weakness.

In letters dated December 28, 2005, the Office informed appellant of the evidence needed to support his claim, to include a physician's comprehensive medical report regarding the cause of his left shoulder condition and requested that the employing establishment respond. By decision dated January 20, 2006, the Office accepted that appellant's job involved the use of his left shoulder but that the medical evidence of record was insufficient to establish that his left shoulder rotator cuff injury was caused by his federal employment.

On February 13, 2006 appellant, through his attorney, requested a hearing. He submitted reports dated November 15 and December 6, 2000 and January 10, 2001 in which Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, reported appellant's postoperative course from his September 2000 surgery on the right shoulder and also noted that he had persistent degenerative joint disease. By letter dated June 19, 2006, counsel changed the hearing request to a request for a review of the written record. In an August 7, 2006 letter, he opined that appellant's left shoulder injury was a consequence of the May 25, 2000 injury. Dr. Valentino submitted a "statement of events and circumstances" describing appellant's employment and claim history. By decision dated August 24, 2006, an Office hearing representative affirmed the January 30, 2006 decision.

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<sup>1</sup> The instant claim was adjudicated by the Office under file number 032045251 and the 2000 claim under file number 030253233. He has a third claim, accepted for aggravation of cervical radiculopathy and adjudicated under file number 032039558.

<sup>2</sup> Appellant also submitted the first page of a letter dated May 4, 2005 and the second page of an operative report dated July 7, 2005.

On August 30, 2006 appellant, through his attorney requested reconsideration. Counsel reiterated that this claim was not a separate injury but a consequence of the right shoulder claim file number 030253233.<sup>3</sup> He submitted a June 1, 2006 report, in which Dr. Richard I. Zamarin, a Board-certified in orthopedic surgery, noted the history of the 2000 right shoulder injury and appellant's report that he injured his left shoulder due to overuse following the right shoulder injury. Dr. Zamarin reviewed medical evidence and provided physical findings and an impairment rating. He advised that appellant's left shoulder injury and surgery were a consequence of his right shoulder injury. In a September 13, 2006 decision, the Office denied appellant's reconsideration request. The Office noted that, as appellant was claiming that his left shoulder injury was a consequence of his right shoulder injury, the evidence submitted was relevant to that claim and not relevant to the instant occupational disease claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>4</sup> 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 disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.<sup>5</sup>

Office regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift.<sup>6</sup> 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 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.<sup>7</sup>

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>6</sup> 20 C.F.R. § 10.5(ee).

<sup>7</sup> *Solomon Polen*, 51 ECAB 341 (2000).

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>8</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.<sup>9</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board notes that appellant's job duties required that he use his left upper extremity. However, appellant failed to establish that he sustained a left rotator cuff tear caused by these employment factors. Dr. Valentino discussed appellant's right upper extremity, which is not at issue in this case.<sup>11</sup> While Dr. Fenlin diagnosed a left rotator cuff tear and performed surgical repair, in his treatment notes dated July 20 and August 31, 2005, he merely described appellant's postoperative recovery. He did not provide an opinion regarding the cause of appellant's left rotator cuff tear. The Board has held that 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.<sup>12</sup> The fact that work activities produced pain or discomfort revelatory of an underlying condition does not raise an inference of causal relationship.<sup>13</sup>

While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.<sup>14</sup> The medical evidence in this case is insufficient to meet appellant's burden of proof that employment factors caused a new occupational disease and the Office properly denied the claim.

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<sup>8</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>11</sup> *Supra* note 1.

<sup>12</sup> *Willie M. Miller*, 53 ECAB 697 (2002).

<sup>13</sup> *Jimmie H. Duckett*, 52 ECAB 332 (2001).

<sup>14</sup> *Patricia J. Glenn*, 53 ECAB 159 (2001).

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>15</sup> Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>16</sup> Section 10.608(b) provides that when an application for reconsideration 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.<sup>17</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>18</sup> Similarly, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>19</sup>

## ANALYSIS -- ISSUE 2

In the August 30, 2006 reconsideration request, appellant's attorney did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Rather, he acknowledged that appellant's left shoulder injury was a consequence of his right shoulder injury, file number 030253233. Consequently, appellant is not entitled to a review of the merits of this claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>20</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), Dr. Zamarin's June 1, 2006 medical report advised that appellant's left shoulder condition was caused by overuse from his right shoulder injury. The Board notes that, the issue of whether the evidence supports that appellant's claimed left shoulder condition was a consequence of his right shoulder injury, should be adjudicated under claim file number 030253233, rather than the instant claim file number 032045251. Appellant, therefore, did not submit relevant and pertinent new evidence not previously considered by the Office and the Office properly denied his reconsideration request.<sup>21</sup>

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<sup>15</sup> 5 U.S.C. § 8128(a).

<sup>16</sup> 20 C.F.R. § 10.606(b)(2).

<sup>17</sup> 20 C.F.R. § 10.608(b).

<sup>18</sup> *Helen E. Paglinawan*, 51 ECAB 591 (2000).

<sup>19</sup> *Kevin M. Fatzner*, 51 ECAB 407 (2000).

<sup>20</sup> *Supra* note 16.

<sup>21</sup> *See Mark H. Dever*, 53 ECAB 710 (2002).

**CONCLUSION**

The Board finds that appellant did not establish that he sustained a new employment-related left shoulder condition and that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>22</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 13, 2006 and August 24, 2005 be affirmed.

Issued: March 5, 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

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<sup>22</sup> The Board notes that on November 22, 2006 appellant was granted a schedule award for bilateral upper extremities under file number 030253233. Appellant has filed an appeal with the Board of that decision, Docket No. 07-427 (issues November 22, 2006).