

**United States Department of Labor
Employees' Compensation Appeals Board**

M.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rochester, MN, Employer**

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**Docket No. 12-1763
Issued: February 6, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 13, 2012 appellant filed a timely appeal from an April 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her occupational disease claim and a July 19, 2012 decision, which denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she developed a right shoulder condition as a result of factors of her federal employment; and (2) whether OWCP properly denied her June 12, 2012 request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 13, 2012 appellant, then a 34-year-old city letter carrier, filed an occupational disease claim alleging that she developed a right shoulder rotator cuff condition as a result of casing and fingering mail and walking and driving to deliver mail. She first became aware of her condition and realized it resulted from her employment on October 27, 2011.²

In a November 3, 2011 diagnostic report, Dr. Mark C. Adkins, a Board-certified diagnostic radiologist, noted appellant's complaints of shoulder pain and observed negative right shoulder results.

In a November 3, 2011 consultation report, M.P. Trenary, a physical therapist, related appellant's complaints of right shoulder pain since approximately two to three months ago. Appellant did not recall doing anything specific but stated that she delivers mail and noted progressively worsening pain since working a route that involved a lot of use of her repetitive right upper extremity. Mr. Trenary reported that an x-ray conducted that morning revealed negative right shoulder. Examination revealed tenderness in the right subacromial space and normal muscle tone and bulk. Spurling's maneuver, Speed's test, and Neer's tests were negative. Hawkin's impingement test and supraspinatus test were positive for pain. Mr. Trenary reported that appellant had limitations secondary to right shoulder pain, which affected her ability to manage heavy weights and perform repetitive right hand activities. He recommended that she undergo physical therapy and a home exercise program.

In a November 3, 2011 report, a nurse practitioner noted appellant's complaints of right shoulder pain since about two months ago. She reported that appellant was a right hand dominant mail carrier for the past four and a half years and stated that the right shoulder pain was constant with the performance of her daily work. Examination of the right shoulder revealed no deformity, erythema, warmth, swelling of the acromioclavicular joint or atrophy. Appellant related pain upon palpation of shoulder but had no difficulty with abduction to 180 degrees.

On January 31, 2012 OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit a comprehensive medical report, including a diagnosis, results of examinations and tests and a physician's opinion with medical rationale explaining the cause of her condition.

Appellant resubmitted the November 3, 2011 reports by the nurse practitioner and physical therapist.

In a decision dated April 5, 2012, OWCP denied appellant's occupational disease claim. It accepted that her work as a letter carrier involved casing and fingering mail but denied her claim finding insufficient medical evidence to establish that she sustained a diagnosed right shoulder condition as a result of her employment duties.

² The record reveals that appellant had two previous traumatic injury claims (File No. xxxxxx828 and xxxxxx854).

On June 12, 2012 appellant submitted a request for reconsideration. She resubmitted the November 3, 2011 reports by the nurse practitioner and physical therapist and the November 3, 2011 radiology report.

By decision dated July 19, 2012, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative and substantial evidence³ including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.⁴ In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁶ 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 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 The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.⁸

ANALYSIS -- ISSUE 1

Appellant alleged that she developed a right shoulder condition causally related to her duties as a city letter carrier. OWCP accepted that her duties included fingering and casing mail,

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁶ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

⁸ *Patricia J. Bolleter*, 40 ECAB 373 (1988).

but it denied her claim finding insufficient medical evidence to establish that she sustained any diagnosed right shoulder condition as a result of her employment duties.

Appellant submitted a November 3, 2011 diagnostic report by Dr. Adkins, who noted her complaints of right shoulder pain but reported that her diagnostic results were negative. The Board notes that pain is a symptom and not generally considered a firm, medical diagnosis.⁹ Dr. Adkins does not provide a medical diagnosis regarding appellant's right shoulder pain, nor does he provide an opinion explaining how appellant's right shoulder pain was causally related to her specific employment duties. The Board has found that rationalized medical opinion evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician.¹⁰ Thus, Dr. Adkins' report is insufficient to establish appellant's claim as he does not provide any firm diagnosis of her condition or an opinion explaining how her right shoulder pain resulted from her employment duties.

Appellant also submitted November 3, 2011 reports by a physical therapist and a nurse practitioner. Both reports indicated that she was a letter carrier and complained of worsening right shoulder pain due to her employment duties. The Board notes, however, that neither the nurse practitioner, nor the physical therapist are physicians as defined under FECA.¹¹ Accordingly, their medical opinions regarding diagnosis and causal relationship are of no probative medical value.¹² Thus, these reports fail to meet appellant's burden of proof.

On appeal, appellant alleged that an enclosed May 7, 2012 report provides a legitimate diagnosis of her right shoulder condition and a medical opinion that her injury was work related. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final decision.¹³ Thus, the Board cannot consider the new May 7, 2012 medical evidence for the first time on appeal. Appellant may submit that evidence to OWCP along with a request for reconsideration within one year of the most recent merit decision. The Board has reviewed the medical evidence of record and found that it fails to establish that she sustained any diagnosed right shoulder condition as a result of her employment duties. Causal relationship is a medical question that must be established by reasoned medical opinion evidence.¹⁴ Because appellant has not provided such rationalized medical opinion in this case, she has failed to meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁹ *B.P.*, Docket No. 12-1345 (issued November 13, 2012).

¹⁰ *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Solomon Polen*, 51 ECAB 341 (2000).

¹¹ The term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹² *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹³ See 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁴ *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *David Apgar*, 57 ECAB 137 (2005).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹⁵ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise her right through a request to the district OWCP.¹⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁷

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.¹⁸ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁹ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²⁰

ANALYSIS -- ISSUE 2

OWCP denied appellant's occupational disease claim finding insufficient medical evidence to establish that she developed a diagnosed right shoulder condition as a result of her employment duties. On June 12, 2012 appellant submitted a request for reconsideration. By decision dated July 19, 2012, OWCP denied her request for reconsideration. The Board finds that OWCP properly denied appellant's request for reconsideration as she did not submit any evidence sufficient to warrant further merit review.

Along with her request for reconsideration appellant resubmitted the November 3, 2011 reports. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²¹ Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal

¹⁵ 5 U.S.C. § 8128(a); *see also* *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹⁶ 20 C.F.R. § 10.605; *see also* *R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁷ *Id.* at § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

²⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²¹ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

argument not previously considered by OWCP; and she has not submitted relevant and pertinent new evidence not previously considered by OWCP. Because she did not meet any of the necessary requirements, she is not entitled to further merit review.

The Board finds that appellant failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. Therefore, OWCP properly refused to reopen her case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she developed a diagnosed right shoulder condition causally related to factors of her employment. The Board also finds that OWCP properly denied her June 12, 2012 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 19 and April 5, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 6, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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