

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

A.H., Appellant)	
)	
and)	Docket No. 12-1470
)	Issued: January 14, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Santa Ana, CA, Employer)	
)	

Appearances:
Chester J. Shelton, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2012 appellant, through her representative, filed a timely appeal from a January 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her occupational disease claim and an April 20, 2012 nonmerit decision denying 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 claim.²

ISSUES

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty as alleged; and (2) whether OWCP properly denied her request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted new evidence with her appeal. The Board has no jurisdiction to review evidence for the first time on appeal which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On March 1, 2010 appellant, then a 45-year-old mail processing clerk, filed an occupational disease claim alleging neck and shoulder conditions due to the repetitive use in her job. She first became aware of her condition and that it was caused or aggravated by her employment on December 9, 2009. Appellant stopped work on December 12, 2009. In a December 9, 2009 statement, she stated that her injury was due to sorting distribution mail, sweeping manual mail and machine loading of mail for the delivery bar code sorter (DBCS). Prior to December 4, 2009, appellant worked in the label room and on nixie mail. On December 4, 2009, due to an error in her previous occupational disease claim, the employer sent her to sort and sweep mail for approximately three to four hours before reassigning her to the DBCS 14 where she put labels into the trays. On December 7, 2009 appellant had to load the DBCS 14 which required constant standing, twisting, bending, movement of shoulders and neck over the eight-hour shift. She noted that she did not work from May 9 until November 23, 2009 and that her previous injury of bilateral shoulder strain did not bother her during that time.

The employing establishment indicated that from December 4 to 12, 2009 appellant worked the following hours: December 4, 2009, 4.97 hours; December 5, 2009, 6.5 hours; December 6, 2009, 8 hours; December 7, 2009, 8 hours; December 8, 2009, 5.01 hours and December 9, 2009, 3.89 hours. It noted that, under the prior bilateral shoulder injury claim, OWCP No. xxxxxx224, appellant had worked in a modified capacity since 2003 until May 9, 2009, when she was sent home due to no work available under the National Reassessment Process. The employing establishment noted that OWCP terminated her compensation under file number xxxxxx224 as a second opinion evaluation found that she had no residuals of her injury and was able to perform the full duties of a mail processing clerk. It stated that appellant did not request light-duty accommodation when she returned to work.³

In a March 9, 2010 letter, OWCP requested additional factual and medical evidence from appellant, including a comprehensive medical report from her treating physician which described her condition and provided an explanation as to how such exposure caused or contributed to her claimed conditions.

In a February 10, 2010 report, Dr. Edward Mittleman, a family practitioner, described appellant's work over the prior 13 years and her work restrictions from the prior claims that were in effect until December 4, 2009. He noted that appellant did not work from May 9 to November 23, 2009. Dr. Mittleman presented findings and noted a review of December 10, 2009 diagnostic studies of the cervical region and both shoulders. He stated that there were no other medical records to review. Dr. Mittleman diagnosed bilateral supraspinatus tendinosis, permanent aggravation of cervical degenerative joint disease and multilevel cervical disc protrusions. He noted that appellant's work involved activities which required her to twist, bend

³ Appellant has several claims with OWCP, including numbers xxxxxx224 and xxxxxx764. Under file number xxxxxx224, she had an accepted bilateral shoulder strain with a date of injury of January 4, 2003. Due to this injury, appellant worked with restrictions until May 9, 2009, when the employer was no longer able to accommodate her limitations. On November 17, 2009 OWCP terminated her compensation benefits as the medical evidence established no objective residuals of the January 4, 2003 injury. On May 18, 2010 OWCP's hearing representative affirmed the November 17, 2009 decision. Appellant returned to work on or about November 23, 2009. These other claims of appellant are not before the Board in the present appeal.

her neck and use her upper extremities. The constant and frequent movement caused the supraspinatus in each of the shoulders to become frayed “tendinosis” which caused pain and limitation of motion of the arms, especially when raising above shoulder level. A similar condition occurred in the neck by the soft tissues rubbing the facets of the cervical vertebra, which irritated the vertebra to the development of degenerative joint disease. The frequent and varied motions of the cervical area caused the outer lining of the cervical discs to become weakened and protrude beyond their physiologic position. Dr. Mittleman opined that appellant’s pathology and symptomatology arose from her duties as a mail processing clerk throughout her 15-year work history. He recommended treatment and set forth work restrictions. A February 10, 2010 duty status report noted work restrictions.

By decision dated June 2, 2010, OWCP denied the claim on the grounds that causal relationship was not established.

On July 7, 2010 appellant requested reconsideration. In a June 11, 2010 report, Dr. Mittleman noted that he had reviewed the September 25, 2009 report of Dr. Peirce Conatly, the second opinion physician whom OWCP relied upon in terminating benefits in case number xxxxxx224. He noted that appellant worked 13 years for the employer as a clerk. Appellant worked on a machine that required constant lifting of heavy mail, constant raising of her arm above the shoulder level and constant movement of her neck. Dr. Mittleman disagreed with Dr. Conatly’s opinion on several points. He stated that appellant had returned to full duty and subsequently developed significant shoulder symptomatology from repeated heavy lifting of mail and constant elevation of her arm above the shoulder level. Dr. Mittleman opined that this activity caused the bilateral supraspinatus tendinosis. He noted that the findings contained in his February 10, 2010 report showed multiple disc protrusions and multiple levels of degenerative changes. Dr. Mittleman explained how the frequent movement of appellant’s head required by repetitive motion activities at work led to osteoarthritis and explained how the repetitive trauma as well as other types of repetitive impulse loading would cause or accelerate the development of joint degeneration, including repetitive lifting, repetitive movements and awkward working postures. He noted that appellant had endured these activities for over 13 years. After Dr. Conatly released appellant to full and unrestricted work activities, she returned to Dr. Mittleman’s office with bilateral shoulder and neck symptomatology along with objective, radiologic findings. He opined that appellant’s pathology caused by her work activities resulted in her present symptomatology. Copies of the December 10, 2009 magnetic resonance imaging (MRI) scans of the cervical spine and shoulders were included.

By decision dated October 5, 2010, OWCP denied modification of the June 2, 2010 decision. It found that the medical evidence lacked a complete factual background of appellant’s employment in the current case as it related to the medical condition.

On February 9, 2011 appellant requested reconsideration. In a November 2, 2010 report, Dr. Mittleman reiterated his opinion that appellant’s work activities resulted in multilevel cervical disc protrusions and permanent aggravation of cervical degenerative joint disease. He stated that working on the DBCS machine or stacker from 1999 to 2007 and on the small parcel bundle sorter machines from June 2004 until February 2009 resulted in constant repetitive trauma that caused biological changes in the facets of the cervical vertebra. The loading of repetitive motions and constant nonphysiologic, backward motion, produced tremendous stresses upon the intervertebral discs, causing them to extend beyond their normal physiologic position or

result in a bulge/protrusion/herniation. Dr. Mittleman reiterated the constant cervical motion weakened the annulus fibrosis allowing the multiple herniations noted on MRI scan.

By decision dated May 2, 2011, OWCP denied modification of its previous decisions.

On October 27, 2011 appellant requested reconsideration. In an October 25, 2011 report, Dr. Mittleman stated that, when appellant was examined by Dr. Brown on December 9, 2009, he related that appellant did not work from May 9 until November 24, 2009 and that she resumed work at that time and was currently working an eight-hour day. He acknowledged that appellant returned to work on November 24, 2009 and was working when filing her claim on December 9, 2009. Dr. Mittleman discussed the activities of a mail processing clerk, working on the DBCS machine, the movement of the shoulders and the effects of such movements on the rotator cuff. He opined that the supraspinatus tendon became inflamed (tendinitis) from the repetitive motions required by the activities described and performed by appellant. Dr. Mittleman further noted that the persistent and repetitive motions of the cervical spine weakened the outer layer of the intervertebral disc (nucleus fibrosus) and, when the fibers start to separate from this repetitive biomechanical impact loading, the intervertebral disc is no longer able to be maintained within its physiologic position which allowed the disc to herniate as seen at multiple levels on the cervical MRI scan.

By decision dated January 10, 2012, OWCP denied modification of its prior decision.

On January 18, 2012 appellant requested reconsideration. Duplicative copies of the December 13, 2009 diagnostic reports were received along with a January 18, 2012 letter from appellant and her representative. In the letter, appellant referenced the prior claim, file number xxxxxx224, and noted that OWCP did not have all the pertinent information available when it terminated appellant's compensation benefits. She argued that the prior claim should be combined into one claim and that the accepted conditions should be upgraded per the diagnostic reports.

By decision dated April 20, 2012, OWCP denied appellant's reconsideration request without a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while 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 These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

⁴ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁵ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

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 employment 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 employment factors identified by the claimant. The medical evidence required to establish a causal relationship 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.⁶ Neither the fact that appellant's condition became apparent during a period of employment nor, her belief that the condition was caused by her employment is sufficient to establish a causal relationship.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that her neck and bilateral shoulder conditions were caused and/or aggravated by her federal employment beginning after her return to work around November 23, 2009 and for which she became aware on December 9, 2009. She stopped work completely on December 9, 2009. The factual evidence, including appellant's statement, supports that from November 24 through December 4, 2009 appellant worked in the label room and on nixie mail. Beginning December 4, 2009, she swept mail for three to four hours and was reassigned to a DBCS for the remainder of her eight-hour work shift. From December 4 through 9, 2009, appellant worked eight-hour work shifts only on December 6 and 7, 2009 and, as noted, worked less than eight hours on other dates before stopping completely. The record indicates that appellant worked for the employing establishment approximately 13 years and that she worked modified duty with restrictions from 2003 until May 5, 2009 under file number xxxxxx224, which was accepted for bilateral shoulder strain and formally terminated by OWCP in a November 17, 2009 decision.⁸

OWCP denied the current claim on the grounds that the medical evidence failed to demonstrate that the claimed medical condition was causally related to the established work-related events.

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

⁸ This appeal pertains only to the new occupational injury claim appellant filed on March 1, 2010 for claimed conditions beginning after her return to work on about November 23, 2009, of which she first became aware on December 9, 2009. This is the claim that OWCP denied in the decisions noted *infra* and which appellant appealed to the Board. See 20 C.F.R. § 501.2(c). If appellant wishes to pursue matters pertaining to her other claims, she should contact OWCP regarding those other claims.

In support of her claim, appellant submitted several reports from Dr. Mittleman. However, Dr. Mittleman's reports fail to explain how the specific established work factors for the period November 24 through December 9, 2009 caused a new occupational disease or aggravated her preexisting conditions based on an accurate factual and medical history. He submitted reports dated February 10, June 11 and November 2, 2010 and October 25, 2011. Dr. Mittleman opined that appellant had bilateral supraspinatus tendinosis, permanent aggravation of cervical degenerative joint disease and multilevel cervical disc protrusions as a result of work activities. He discussed the effects of the movements on the body required by the work activities as well as the physiologic changes of such movements with regard to appellant's conditions. However, Dr. Mittleman appeared to base his opinion that appellant's conditions were caused by her employment over her 13 years of employment and on the basis that she performed the described activities on a persistent and repetitive basis. The present claim, however, involves work activities and conditions arising on and after November 23, 2009, when, as noted, appellant worked only a limited number of hours and days. The factual evidence does not document the extensive type of duties noted by Dr. Mittleman from November 24 through December 9, 2009. As noted, appellant did not work after May 5, 2009 until she returned to work around November 23, 2009. Dr. Mittleman failed to explain how the specific work activities appellant experienced from about November 23 through December 9, 2009 caused a new condition or affected her preexisting conditions. Thus, his opinion is entitled to little probative value. The Board notes that, while Dr. Mittleman took issue with a medical opinion in file number xxxxxx224, file number xxxxxx224 is not presently before the Board.

Other medical reports and reports of diagnostic testing are insufficient as they either do not pertain to the present claim or contain no opinion on causal relation in the current claim. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained a neck or shoulder condition causally related to work factors in the present claim. Appellant did not meet her burden of proof.

On appeal, appellant contends that she submitted sufficient medical evidence to establish her occupational disease claim. While the factual evidence is sufficient to establish her work duties when she returned to work on or about November 23, 2009, the medical evidence is not sufficiently rationalized to establish her claim. Appellant's arguments appear to stem out of disagreements with OWCP's termination decision under file number xxxxxx224, over which the Board has no jurisdiction.¹⁰

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 *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009); *D.I.*, 59 ECAB 158 (2007).

¹⁰ *See supra* note 8.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹¹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹² To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

On January 18, 2012 appellant requested reconsideration. Duplicative copies of the December 13, 2009 diagnostic reports were received along with a January 18, 2012 letter from appellant and her representative. In the letter, appellant referenced the prior claim, file number xxxxxx224, and noted that OWCP did not have all the pertinent information available when it terminated her compensation benefits. She argued that the prior claim should be combined into one claim and that the accepted conditions should be upgraded per the diagnostic reports.

In the January 18, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant's argument that the prior claim should be combined into one claim and that the accepted conditions should be upgraded does not show that OWCP erroneously applied or interpreted a specific point of law as these matters generally pertain to a prior claim and are not relevant to the present claim. The underlying issue in this case was whether appellant established a condition causally related to her work duties from the period November 23 through December 9, 2009. That is a medical issue which must be addressed by relevant medical evidence.¹⁴

Appellant did not submit any new and relevant medical evidence. Appellant submitted duplicative copies of the December 13, 2009 diagnostic reports. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.¹⁵ In this case, appellant did not submit any new and relevant medical evidence supporting causal relationship.

¹¹ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(1)-(2).

¹³ *Id.* at § 10.607(a).

¹⁴ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁵ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained neck and shoulder conditions in the performance of duty, as alleged. OWCP properly denied her request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the April 20 and January 10, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 14, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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