

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

DEBRA A. SMITH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
ASHVILLE POST OFFICE, Ashville, AL,
Employer**

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**Docket No. 04-1141
Issued: September 14, 2004**

Appearances:
Chuck Hunter, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 24, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated June 26, 2003 denying her claim for a right shoulder condition and a nonmerit decision dated January 15, 2004 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the causal relationship issue and over the nonmerit denial of reconsideration.

ISSUES

The issues on appeal are: (1) whether appellant has established that she sustained rotator cuff tendinitis and acromioclavicular joint arthrosis of the right shoulder causally related to work factors; and (2) whether the Office properly denied appellant's request for reconsideration under section 8128 of the Federal Employees' Compensation Act. On appeal, appellant asserted that the reports of Dr. Christopher G. Kelley, an attending Board-certified orthopedic surgeon, were sufficient to establish causal relationship and to warrant reopening her claim on the merits.

FACTUAL HISTORY

On December 10, 2002 appellant, then a 43-year-old modified distribution clerk,¹ filed an occupational disease claim asserting that she sustained right shoulder problems and right arm pain beginning on January 2, 2002 due to performing window clerk duties. She asserted that in January 2002 she asked Postmaster Joyce Merkel, her supervisor, to reduce her window clerk duties. Following intermittent absences, appellant stopped work on November 5, 2002 and did not return.² The employing establishment controverted appellant's claim, asserting that she had irregular attendance and a poor attitude.

Appellant submitted medical evidence in support of her claim. In a March 21, 2002 slip, Dr. David W. Cosgrove, an attending Board-certified anesthesiologist, released appellant to work as of March 22, 2002 within previous limitations, with the addition of "[n]o use of manual money-order machine." Dr. Kelley, an attending Board-certified orthopedic surgeon, submitted a November 14, 2002 report noting a one-week history of severe right shoulder pain over the rotator cuff area with "[n]o known injury." He diagnosed right shoulder rotator cuff tendinitis and an acromioclavicular joint arthrosis. Dr. Kelley obtained a right shoulder magnetic resonance imaging (MRI) scan showing a "small degenerative cyst within the superolateral aspect of the right humeral head." He opined in a December 2, 2002 report that the right shoulder MRI scan showed impingement and mild acromioclavicular joint arthrosis. Dr. Kelley noted appellant's assertion that her right shoulder condition was "work related and certainly it could be given her lifting as part of her job...." In an undated form report, Dr. Kelley again noted "[n]o history of injury" and stated that diagnosed tendinitis and arthrosis were "[p]ossibly caused by lifting" at work." He found appellant totally disabled for work from November 14 to December 2, 2002 and released her to light duty as of December 9, 2002. Dr. Kelley limited pushing, pulling and lifting to five pounds with the right arm and prohibited overhead work with the right arm.

In a February 12, 2003 letter, the Office advised appellant of the type of additional evidence needed to establish her claim, including a detailed statement of the implicated work factors.

By decision dated March 18, 2003, the Office denied appellant's claim for right shoulder tendinitis on the grounds that she failed to submit a detailed description of the employment factors or conditions which she believed caused or adversely affected her claimed conditions.

In an April 16, 2003 letter, appellant requested reconsideration. She attributed her right shoulder condition to using a manual money order machine while on window clerk duty, distributing and boxing mail and moving parcels during the Christmas season. Appellant asserted that on most Mondays, Wednesdays and Fridays from October 2001 to January 2002, she was the only window clerk on duty but Ms. Merkel refused to provide assistance. She noted

¹ As of December 10, 2002, appellant was assigned to a permanent rehabilitation position as a modified distribution clerk due to a previously accepted bilateral carpal tunnel syndrome. She was restricted to lifting up to 10 pounds and pushing or pulling up to 15 pounds, with limited repetitive work.

² On February 19, 2003 appellant rejected a February 5, 2003 limited-duty job offer.

a history of three bilateral carpal tunnel releases, a right trigger thumb release and surgery to repair a gastric hernia and ulcer. She submitted a September 18, 2002 x-ray report showing minimal to mild chronic changes of the distal end of the right clavicle “compatible with old trauma” versus arthritis.

In a May 7, 2003 memorandum, Ms. Merkel confirmed that appellant worked as a window clerk in Ashville beginning on October 19, 2001 and in the box section.³ She asserted, however, that appellant received appropriate assistance.

In a June 11, 2003 statement, Sara Witherspoon, a union steward, stated that a clerk at the Ashville branch confirmed that Ms. Merkel had appellant work the window alone and that on one occasion, no assistance was provided until the line for money orders was out the front door. Ms. Witherspoon alleged that appellant was instructed to perform duties outside of her medical restrictions.

By decision dated June 26, 2003, the Office modified the prior decision, finding that appellant had established as factual that she issued money orders using a manual money order machine, worked “the window duties alone without assistance, boxed and distributed mail, and t[ook] all sizes of parcels over the counter during the Christmas holidays.” The Office denied appellant’s claim on the grounds that she submitted insufficient medical evidence to establish that the accepted work factors caused the claimed right shoulder conditions.

On October 29, 2003, appellant requested reconsideration and asserted that Ms. Merkel “wrote her up” in retaliation for taking leave. Appellant submitted timekeeping records for the period October 1, 2001 to March 9, 2002, documents pertaining to grievances against Ms. Merkel, a January 28, 2002 letter of demand regarding a \$250.20 shortage and a February 4, 2002 letter of warning regarding her attendance. She also submitted a list of medical appointments from April 17, 2000 to February 15, 2002 and a duplicate copy of Dr. Cosgrove’s March 21, 2002 slip.

By decision dated January 15, 2004, the Office denied reconsideration on the grounds that appellant had not submitted new, relevant evidence warranting a merit review of the previous decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act⁴ 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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is causally related to the

³ The record indicates that appellant was assigned to the Jacksonville Post Office effective June 2002 then to the Odenville branch in October 2002.

⁴ 5 U.S.C. §§ 8101-8193.

employment injury.⁵ 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.⁶

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) 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 causal relationship is generally 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.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that she developed tendinitis and an acromioclavicular joint arthrosis of the right shoulder due to distributing and boxing mail, using a manual money order machine, moving parcels during the holiday season and working the window without assistance. In its June 26, 2003 decision, the Office accepted these work factors as factual. However, the Office denied appellant's claim for compensation on the grounds that the medical evidence was not sufficient to establish that the diagnosed condition was causally related to the accepted factors of her employment.

In a November 14, 2002 report, Dr. Kelley diagnosed right rotator cuff tendinitis and an acromioclavicular joint arthrosis with "no known injury." In a December 2, 2002 report, Dr. Kelley opined that the diagnosed conditions "could be" work related "given her lifting as part of her job." He reiterated this opinion in an undated form report, characterizing the diagnosed conditions as "[p]ossibly caused by lifting" at work, although he also stated there was "[n]o history of injury." Dr. Kelley opined that appellant had no known history of right shoulder injury and that the diagnosed tendonitis and acromioclavicular arthrosis were possibly related to lifting at work. The speculative, equivocal nature of Dr. Kelley's opinion on causal relationship diminishes its probative value.⁸ Dr. Kelley did not identify specific work tasks involving lifting which he believed caused or contributed to appellant's right shoulder conditions.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *Solomon Polen*, 51 ECAB 341 (2000).

⁸ *Conard Hightower*, 54 ECAB ____ (Docket No. 02-1568, issued September 9, 2003).

The September 18, 2002 x-ray report noted indications of “old trauma” to the distal right clavicle but did not attribute this finding to any work factors. Thus, the probative value of these opinions is diminished as they are not based on a complete, accurate and factual background.⁹ The Board finds that Dr. Kelley did not provide sufficient medical rationale explaining how or why lifting at work would cause the diagnosed conditions. Without such rationale, Dr. Kelley’s opinion is insufficient to meet appellant’s burden of proof in establishing her claim.¹⁰ Dr. Cosgrove, an attending Board-certified anesthesiologist, indicated in a March 21, 2002 note that appellant should not use the manual money order machine, but did not specifically attribute any medical condition to her use of the machine. Dr. Cosgrove’s opinion is insufficiently rationalized to meet appellant’s burden of proof.¹¹

As appellant did not submit sufficient rationalized medical opinion evidence to establish causal relationship, the Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal 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.¹² 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The issue in the case is whether appellant has established a causal relationship between the accepted work factors and the claimed right shoulder conditions. To be relevant, the evidence submitted on reconsideration must address causal relationship. Causal relationship is a medical issue that must be established, generally, through the submission of medical evidence.¹⁵

⁹ *Carol S. Masden*, 54 ECAB ____ (Docket No. 02-1667, issued January 8, 2003).

¹⁰ *See Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹¹ *See Jimmie H. Duckett*, *supra* note 10; *Frank D. Haislah*, *supra* note 10.

¹² 20 C.F.R. § 10.606(b)(2) (2003).

¹³ 20 C.F.R. § 10.608(b) (2003).

¹⁴ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

¹⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

Appellant did not submit such evidence in support of her October 29, 2003 request for reconsideration. She submitted union grievance documents, timekeeping records, disciplinary letters and a list of medical appointments. While these documents are new evidence, they are not relevant as they do not constitute medical evidence and do not address the critical issue of causal relationship.

In a letter accompanying her October 29, 2003 request for reconsideration, appellant newly asserted that her supervisor, Ms. Merkel, retaliated against her for taking leave. However, this allegation does not constitute a new, pertinent legal argument. Appellant also submitted a duplicate copy of Dr. Cosgrove's March 21, 2002 slip. This evidence was previously of record and considered by the Office prior to the issuance of the Office's March 18, 2003 decision. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.¹⁶

The Office correctly found in its January 15, 2004 decision that appellant did not submit relevant and pertinent new evidence not previously considered by the Office supporting that she sustained a right shoulder condition in the performance of duty as alleged. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office properly refused to reopen her claim for a merit review. Consequently, appellant is not entitled to a review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2) of the Act's implementing regulations. Accordingly, the Board finds that the Office properly denied appellant's October 29, 2003 request for reconsideration.

¹⁶ *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994).

CONCLUSION

The Board finds that the Office properly found that appellant had not established that she sustained a right shoulder condition in the performance of duty as she submitted insufficient rationalized evidence to establish a causal relationship between accepted work factors and the diagnosed conditions. The Board further finds that the Office properly denied appellant's October 29, 2003 request for reconsideration on the grounds that the evidence submitted in support thereof was not relevant to the critical issue of causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 15, 2004 and June 26, 2003 are affirmed.

Issued: September 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member