

By letter dated July 20, 2004, the Office requested that the employing establishment submit information regarding the claim. In a letter of the same date, it advised appellant that the evidence submitted was insufficient to establish her claim. The Office further addressed the factual and medical evidence she needed to submit to establish her claim.

In a July 14, 2004 statement and a July 29, 2004 letter, Carol Dickerson, an employing establishment supervisor, related that on July 13, 2004 appellant told her that she was not having a problem with her shoulder and that she filed her claim based on the advice of the union due to a current arbitration case involving the Office's payment of a bill for a magnetic resonance imaging (MRI) scan related to her March 2003 recurrence of disability claim. Ms. Dickerson stated that appellant had been in her current position since 1999 and performed all the duties of this position with the exception of no lifting over 20 pounds and no reaching above the shoulder.

In a March 6, 2003 routing slip, appellant advised Ms. Dickerson that she sustained a rotator cuff tear according to a March 3, 2003 MRI scan. She stated that no additional information would be available until after her medical appointment on March 10, 2003. Appellant noted that she experienced long-term pain and could not pinpoint the date when it began.

Appellant submitted an August 17, 2004 statement in which she contended that she did not sustain an injury on March 7, 2003. Rather, she alleged a permanent work-related left shoulder injury for which she underwent surgery. Appellant described the duties of her limited-duty retail clerk position which included lifting up a counter/gate weighing more than 30 pounds that caused pain in her shoulder. Based upon her request, the counter was cut and weighed about 15 pounds. However, appellant still experienced constant pain in her shoulder due to lifting up the counter.

In an undated statement, appellant related that on March 30, 1994 she accepted a limited-duty position due to her accepted claim for shoulder and neck injuries. She was not released to return to her regular job and her work limitations were permanent. An MRI scan revealed a herniated disc at C5-6. Appellant's case worker advised her to file a Form CA-2 which was denied. She addressed the work duties she performed in the limited-duty position and stated that her neck condition worsened in September 1993. The Office stopped physical therapy for appellant's neck and shoulder. She indicated that her prior claims for neck, shoulder, left arm and back injuries were approved in 1988. The claims were subsequently closed and appellant requested that they be reopened due to an MRI scan which showed a rotator cuff tear.

Appellant submitted documents regarding her prior injuries sustained at work, and requests for surgery and to buy back leave. In a February 22, 1996 report, Dr. Rodney A. Mortenson, an attending Board-certified orthopedic surgeon, diagnosed an inflamed supraspinatus tendon of the left shoulder with impingement syndrome and possible incomplete partial rotator cuff tear of the left shoulder. He recommended subacromial decompression surgery. Appellant also submitted several reports from Dr. Kyle L. Cabbell, a Board-certified neurosurgeon. On March 4, 2003 he reported a normal left shoulder based on an x-ray examination. In a March 7, 2003 report, Dr. Cabbell noted appellant's complaint of left shoulder pain and treatment. He provided findings on physical examination and reviewed MRI scan results. Dr. Cabbell diagnosed spondylosis without myelopathy of the cervical spine, cervical

radiculopathy and a left rotator cuff tear. He concluded that appellant would probably require surgery. Dr. Cabbell's March 18, 2003 report revealed that appellant's pain was treated with acupuncture and by a chiropractor. Appellant's pain improved but she still experienced discomfort. Dr. Cabbell saw no need for surgery.

A March 4, 2003 MRI scan obtained by Dr. Mark Shogry, a Board-certified radiologist, found that spondylosis at the C5-6 level had worsened since a comparison examination in 1997. It noted large posteriorly projecting osteophytes which covered protruding disc material resulting in canal narrowing such that there was some flattening of the ventral aspect of the cord that resulted in bilateral neural foraminal narrowing that could affect either C6 nerve root. There was moderate spondylosis at C4-5 without foraminal compromise. Regarding the left shoulder, Dr. Shogry found marked tendinopathy of the distal infraspinatus and supraspinatus tendons with a full thickness, a nonretracted tear of the distal supraspinatus tendon and a prominent arthropathy of the acromioclavicular (AC) joint.

In an August 26, 1996 report, Dr. Mortenson noted her left shoulder pain, that she was returning to work and that surgery was considered. An October 2, 1996 report diagnosed low grade impingement syndrome of the left shoulder. In reports dated February 22, 1996 to January 11, 1999, Dr. Mortenson recommended that appellant undergo an arthroscopic evaluation of the left shoulder and open subacromial decompression. On January 19, 1999 Dr. Mortenson performed arthroscopic surgery and subacromial decompression on appellant's left shoulder. A March 31, 1999 report described his surgical findings. Dr. Mortenson stated that appellant's symptoms started with great intensity after she slipped on ice in January 1988 although she was having some mild trouble for a year or two prior to this injury. He noted the physical requirements of appellant's job at the employing establishment and medical treatment she received for her left shoulder. Dr. Mortenson opined that appellant's left shoulder problems were caused by repetitive activities required by her work. In a June 2, 2004 report, he stated that appellant's tendinitis of the left shoulder progressed to impingement syndrome which led to a rotator cuff tear.

An unsigned November 9, 1995 report of Dr. Stephen C. Robinson, a Board-certified neurosurgeon, provided his essentially normal findings on neurological examination of appellant's left shoulder. He stated that her limitations mainly needed to revolve around her left shoulder and that her previous limitations were appropriate. Dr. Robinson stated that any neurosurgical intervention or further evaluation was not necessary with regard to appellant's cervical disc disease.

A March 5, 2003 x-ray report from Dr. Peter M. Gallerani, a Board-certified radiologist, found moderate AC joint degenerative changes. There were no acute bony findings.

In a June 30, 1994 report, Dr. Eric L. Dean, an internist, provided a history that on January 12, 1998 appellant slipped on ice and injured her back, neck, right knee and left shoulder. Appellant's back and knee improved fairly quickly while she continued to experience neck and left shoulder pain. Dr. Dean noted that appellant was seen by Dr. Mortenson and that she had post-traumatic biceps tendinitis which was treated by injection. He stated that, although she had achieved transient relief, she continued to have intermittent shoulder, neck and low back

pain since her fall. Dr. Dean concluded that the pain was aggravated by repetitive and occasionally strenuous activity required by her work duties.

By decision dated August 25, 2004, the Office found that appellant did not sustain an injury while in the performance of duty. The factual evidence failed to establish that an injury occurred as alleged. Further, the medical evidence failed to establish a causal relationship between the alleged condition and appellant's employment duties.

Subsequently, the Office received a copy of an employing establishment's job offer for a temporary limited-duty position. On October 15, 1999 appellant accepted the job offer of modified-duty work as a retail sales clerk but, opposed the stated work hours and days off from work. The Office received appellant's employment records and a description of the retail sales clerk position. In an August 21, 2004 letter, Ms. Dickerson agreed with appellant's August 17, 2004 statement that there were no accidents or injury on March 7, 2003 or in July 2004. She described how the physical requirement of lifting up a swing door was modified to accommodate appellant's physical limitations. Ms. Dickerson stated that appellant was not having any current problems with her shoulder. She noted that lifting up the swing door required use of the right hand and that appellant's pain was located in her left shoulder.

By letters dated August 13 and 21, 2005, appellant, through her union representative, requested reconsideration of the Office's August 25, 2004 decision. She submitted duplicate copies of Dr. Mortenson's reports, correspondence regarding her prior claims, her March 6, 2003 note and August 17, 2004 letter, the description of her modified retail sales clerk position and Ms. Dickerson's July 14 and 29 and August 21, 2004 letters.

By decision dated October 27, 2005, the Office denied modification of the August 25, 2004 decision. It found the medical evidence of record insufficient to establish that appellant sustained an injury causally related to factors of her federal employment.

In a January 24, 2006 letter, appellant, through her union representative, requested reconsideration. She submitted an August 9, 1999 letter from Tonnette S. Hunt, regarding payment for physical therapy and medical bills covering the period March 1999 to June 7, 2002. Appellant also submitted the Office's June 8, 1999 letter accepting her claim assigned number 06-0721535 for tendinitis of the left shoulder. Progress notes from her physical therapist indicated that she was treated on intermittent dates from January 27 to March 31, 1999. Appellant submitted patient information forms she completed on January 26 and 27, 1999 and a duplicate copy of the Office's October 27, 2005 decision.

On February 6, 2006 the Office denied appellant's request for reconsideration. It found that it neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of 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.² These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

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.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish a causal relationship between her left shoulder condition and her federal employment.

The record reveals that as early as 1996 appellant was diagnosed with impingement syndrome of the left shoulder. She underwent subacromial decompression surgery by Dr. Mortenson on January 19, 1999.

Appellant submitted several medical reports from Dr. Mortenson, which covered the period February 1, 1993 to March 31, 1999; Dr. Dean's June 30, 1994 report which diagnosed several conditions related to appellant's left shoulder and a report from Dr. Robinson. These

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

⁴ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

medical reports predate the filing of her present claim on July 7, 2004. For this reason they are not relevant to the claim and are insufficient to establish her claim. Dr. Mortenson's December 7, 1998 report opined that the diagnosed conditions of inflammation of the supraspinatus tendon and a "possible" small partial tear on the undersurface of the distal tendon could be caused by overuse by appellant or related to a 1993 work injury is speculative and equivocal in nature and, thus, of little probative value.⁵ He stated that he was not exactly sure about a causal relationship. Although, Dr. Mortenson reported on March 31, 1999 that he had no doubt that appellant's left shoulder problems were related to her repetitive duties at work, he did not describe or identify the implicated employment factors nor explain the mechanism by which they caused the problems. This opinion is not relevant to the present claim of 2004 and was rendered prior to when appellant commenced her limited-duty work in October 1999.

Dr. Cabbell's March 7, 2003 report found that appellant had spondylosis without myelopathy of the cervical spine, cervical radiculopathy and a left rotator cuff tear. He stated that she would probably need neck surgery. In a March 18, 2003 report, Dr. Cabbell stated that appellant still experienced pain despite being treated with acupuncture and by a chiropractor. His reports fail to address the causal relationship between the diagnosed conditions and appellant's work duties as a modified sales clerk. Dr. Cabbell did not explain how her employment would cause or aggravate her left shoulder condition. The Board finds that this evidence is insufficient to establish appellant's claim.

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained neck and left shoulder conditions causally related to factors of her federal employment as a distribution clerk. She did not meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,⁶ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁷ To be entitled to a merit review of an Office 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.⁸ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

⁵ *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he 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).

⁷ 20 C.F.R. § 10.606(b)(1)-(2).

⁸ *Id.* at § 10.607(a).

ANALYSIS -- ISSUE 2

In an October 27, 2005 decision, the Office found that appellant did not sustain an injury while in the performance of duty. On January 24, 2006 appellant, through her representative, disagreed with this decision and requested reconsideration. Thus, the relevant underlying issue in this case is whether appellant sustained an injury causally related to factors of her federal employment.

Appellant submitted an August 9, 1999 letter from Ms. Hunt regarding payment for physical therapy and medical bills that covered treatment she received from March 1999 to June 2002. She also submitted the Office's June 8, 1999 letter accepting her prior claim for tendinitis of the left shoulder and patient information forms she completed on January 26 and 27, 1999. As the relevant issue is medical in nature, the letters from Ms. Hunt and the Office, and appellant's medical bills are irrelevant and insufficient to warrant reopening appellant's claim for further merit review.

Similarly, the progress notes from appellant's physical therapist, which covered the period January 27 to March 31, 1999 are irrelevant as the underlying issue is medical in nature and a physical therapist is not a physician as defined under the Act.⁹

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of her request for reconsideration. Further, she did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.¹⁰

CONCLUSION

The Board finds that appellant has failed to establish that she sustained an injury while in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁹ 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, *supra* note 7 (a physical therapist is not a physician under the Act).

¹⁰ See *James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2006 and October 27, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 14, 2006
Washington, DC

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

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