

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

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**G.Z., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kingsfield, MI, Employer**

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**Docket No. 07-1956  
Issued: February 14, 2008**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 13, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs hearing representative's decision dated June 11, 2007 and merit decisions dated July 21 and December 20, 2006 and January 18, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issues are: (1) whether appellant has established that he sustained an injury to his left shoulder in the performance of duty on April 28, 2005; and (2) whether he has established that he sustained an occupational bilateral shoulder condition in the performance of duty.

**FACTUAL HISTORY**

Appellant, a 43-year-old mail clerk, filed a Form CA-1 claim for benefits, alleging that he injured his left shoulder while lifting a flat tub container with his left hand on April 28, 2005. The claim was docketed as No. 092059686. In support of his claim, appellant submitted: (a) an April 28, 2005 excusal from work from Dickinson County Healthcare; (b) an April 28, 2005

Form CA-17, duty status report indicating that appellant sustained an injury on April 28, 2005; (c) an April 28, 2005 Form CA-16, signed by Daniel D. Watts, appellant's supervisor, authorizing medical treatment for an injury he sustained on April 28, 2005; and (d) an April 28, 2005 x-ray report.

In a report dated April 28, 2005, Dr. Douglas D. McDowell, an osteopath, stated:

“[Appellant a] 43-year-old male who presents to the emergency department with complaints of pain to his left shoulder. He has no new trauma. [Appellant] has no numbness, tingling or weakness, no other complaints. He has increasing pain with range of motion. With range of motion his pain is 7 to 8 out of 10. [Appellant] does state that he has had a history of carpal tunnel surgery on the right on November 2004. No other significant past medical history.”

Dr. McDowell diagnosed left shoulder bursitis.

In a February 7, 2006 report, Dr. Donald L. Wackwitz, Board-certified in orthopedic surgery, related that he was seeing appellant for follow-up of electromyogram (EMG) nerve conduction studies. He indicated that there were no EMG changes in the infraspinatus and supraspinatus musculature suggesting denervation. Dr. Wackwitz did note some atrophy in the posterior aspect of the left shoulder, with pain in the external rotation of the shoulder relating to the infraspinatus. He advised that results of the magnetic resonance imaging (MRI) scan showed a large posterior shoulder ganglion and recommended a shoulder arthroscopy, debridement of the posterior labrum and probable open incision of the ganglion.

On April 18, 2006 appellant filed a Form CA-2 claim for benefits, alleging that he developed a bilateral shoulder condition causally related to factors of his employment. The claim was docketed as No. 092071466. Appellant submitted a May 4, 2006 treatment note which indicated that he could return to light duty on May 5, 2006.

By letter dated May 31, 2006, the Office advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits based on his claimed bilateral shoulder condition. It asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition and an opinion as to whether his claimed condition was causally related to his federal employment. The Office requested that appellant submit the additional evidence within 30 days.

Appellant submitted a May 9, 2006 report from Dr. Wackwitz, who stated:

“[Appellant] is seen for follow-up for his right shoulder. He has had some pain in his right shoulder. [Appellant] has had a light[-]duty job at [the employing establishment] and he has been doing some sorting. Doing sorting, he has some times when his shoulder is painful with extension. [Appellant] has been protecting his left shoulder. The left shoulder has not changed in symptomatology during this interval.

“[Appellant] has tenderness over the anterior aspect of his right shoulder. He has positive impingement signs with abduction, internal rotation and also in Hawkins

position. [Appellant] has some tenderness along the biceps tendon, but his Yergason sign and Speed signs are negative. His [acromioclavicular] joint is nontender. Circulation, motor and sensory are otherwise intact. Rechecking the posterior aspect of [appellant's] shoulder, comparing both sides, shows that [he] does have good contraction of the infraspinatus and supraspinatus muscles on the right side as compared to decreased contraction of the infraspinatus on the left side, but he does have some contraction.”

Dr. Wackwitz diagnosed persistent mild rotator cuff tendinitis.

Appellant submitted a January 16, 2006 magnetic resonance imaging (MRI) scan which indicated that he had a large superior labral tear extending into both the anterior and posterior labrum with extensive posterior paralabral cyst formation; he also submitted a January 26, 2006 nerve conduction study and EMG report from Dr. Dennis M. Hudson, Board-certified in physical and rehabilitative medicine. Dr. Hudson noted increasing left shoulder pain which he attributed to consequent increased use of his left upper extremity. He found no electrophysiological evidence for left upper extremity plexopathy or cervical radiculopathy.<sup>1</sup>

By decision dated July 21, 2006, the Office denied appellant's claim, finding that he failed to submit medical evidence sufficient to establish that he sustained the claimed occupational bilateral shoulder condition in the performance of duty.

In a report dated August 8, 2006, Dr. Jane K. Sliwinski, Board-certified in preventive medicine, stated findings on examination, reviewed the medical history and the statement of accepted facts and concluded that appellant had left shoulder pain due to a large multiloculated posterior paralabral cyst and a large superior, anterior and posterior labral [SLAP] tear. She concluded:

“There is no specific injury at work.

“[Appellant] developed the gradual onset of pain in his left shoulder in April 2005 which was five months after his right carpal tunnel surgery occurred. He alleges that his left shoulder pain occurred from using his left arm exclusively at work following [appellant's] right hand surgery. However, it is noteworthy that [appellant's] right hand carpal tunnel release had an excellent postoperative result and he was back to full[-]work duties in January 2005 which is three months prior to the onset of [appellant's] left shoulder symptoms. Thus, although [appellant] alleges that his left shoulder pain began due to favoring his right hand, his right hand carpal tunnel surgery had healed extremely well and should not have required any reduced use of the right hand or increased use of the left shoulder or hand after January of 2005.

“[Appellant's] job at that time was a ‘light’ job and did not involve more than an occasional amount of overhead work with the left arm. This presentation is not one that is consistent with a work[-]related left shoulder injury due to an overuse

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<sup>1</sup> Appellant also submitted a June 20, 2006 return to work note from the Prevea Clinic.

syndrome or repetitive motion strain. [Appellant's] left shoulder pain is primarily due to the large multiloculated posterior paralabral ganglion cyst which is definitely not work related and is of idiopathic etiology.

“[Appellant] also has a SLAP lesion. Without any specific injury and knowing the nature of his job, the SLAP lesion is not consistent with a work-related basis. Thus, his left shoulder SLAP lesion is also definitely not work related.”

On November 16, 2006 appellant requested reconsideration.<sup>2</sup>

By decision dated December 20, 2006, the Office denied the request for modification of the July 21, 2006 decision.

In a letter dated December 13, 2006, the Office informed appellant that it required additional factual and medical evidence in support of his claim, including a medical report addressing his left shoulder complaints as they existed prior to April 28, 2005, a history of what occurred on April 28, 2005 and a diagnosis and explanation of how his claimed condition was causally related to the April 28, 2005 work incident.<sup>3</sup>

In a statement dated December 20, 2006, appellant stated:

“[On] January 10, 2005 I experienced a sharp pain in my left shoulder which was unbearable to me. I was directed to go to [the] hospital, but elected to schedule an appointment with Dr. Cullen with the Prevea Clinic in Green Bay, Wisconsin, who was the physician that was handling my [workers' compensation] case.... I was still using my left arm [as my primary hand, which] was irritating my right hand.

“[On] April 28, 2005 I was finally able to get in to see Dr. Cullen on my left shoulder pain and to also address my left lateral epicondylitis which had flared up again do to the overuse of my left arm. His treatment involved some anti-inflammatory medication for my solder for starters and another injection into my left elbow for the pain.”

Appellant's supervisor submitted a December 27, 2006 statement in which he stated:

“I am writing this memo[random] in regards to the accident [appellant] suffered on his left shoulder on January 10, 2005. On January 10, 2005 [appellant] came to me in regards of the pain he was experiencing in his left shoulder from pulling a flat tub container. [He] had right carpal tunnel surgery and was doing all of the

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<sup>2</sup> Appellant stated in his request letter, that the Office had just recently informed him that his left shoulder labrum tear had been accepted in May 2005.

<sup>3</sup> The Office advised appellant that he needed to keep the multiple claims he had filed separate and distinct. It noted that he had filed a claim for bilateral elbow and bilateral wrist complaints in May 2002, No. 092021800 [not adjudicated in this decision]; a claim for a bilateral shoulder condition in April 2006; No. 092071466; and the claim for traumatic injury dated April 28, 2005; No. 092059686, for which it had approved emergency room care but had not yet issued a formal decision as to whether appellant had sustained a work-related injury.

duties and functions of his job with only his left arm. As [appellant] explained to me he was lifting a flat tub with his left arm and felt a sharp burning pain in his left shoulder. I directed him to go to the emergency room. [Appellant] asked if he could wait and go to his attending physician that had been dealing with his other injuries because the local emergency room here in town would only treat the immediate pain and not pursue what was actually wrong in his left shoulder. I told [appellant] I would fill out the notice of traumatic injury form after he saw the physician. [Appellant] saw Dr. Cullen on April 25, 2005 and the CA-1 was filled out on April 28, 2005.”

In a September 27, 2006 report, Dr Alex S. Judy, a specialist in family practice, indicated that appellant had developed several upper extremity conditions, including a ganglion cyst in his left shoulder, which were caused by overuse at work. He opined that these were work-related injuries given the nature of [appellant’s] work and the numerous notes which referenced ongoing repetitive motions at work and the adverse effects this was having on his musculoskeletal system over the past two years.

Appellant submitted a May 1, 2005 report from the Prevea Clinic which indicated that he had left shoulder pain and stated findings on examination. The report noted full forward flexion, full abduction, reasonable external rotation with benign biceps and no significant instability.

By decision dated January 18, 2007, the Office denied the claim for benefits based on a traumatic injury occurring on April 28, 2005 finding that appellant failed to establish fact of injury. It found that he failed to submit evidence to establish that he experienced the alleged incident stated at the time, place and stated manner alleged.

Appellant submitted a January 23, 2006 report from Dr. Wackwitz. He stated:

“[Appellant] was seen for evaluation of his left shoulder. He is a 44-year old postal service employee ... who has had increasing pain in his left shoulder of relatively insidious onset through this summer. [Appellant] was having some aching in the shoulder and pain which would bother him after working with sorting mail especially if he had to use his arms and elbows extended in front of him.

“On physical examination today [appellant] has full range of motion of his shoulder with a minimal disturbance in scapulohueral rhythm. He has negative impingement signs. [Appellant] has some tenderness with irroduction and adduction in the impingement position. His maximal tenderness is in two places, one anteriorly and one posterior just beneath the scapular spine. I do note that [appellant] has some relative weakness and atrophy of his infraspinatus muscle on the left side as compared to his right side.”

Dr. Wackwitz diagnosed posterior ganglion cyst of the left shoulder with some nearby infraspinatus atrophy based on MRI scan and arteriogram.

On February 7, 2007 appellant requested a review of the written record.

In a February 15, 2007 statement, Mr. Watts stated:

“This date issue seems to be the problem in the denial of this claim. If I[,] as [appellant’s] supervisor[,] put the wrong date of April 28, 2005 on his CA-1 it should [not] be [appellant’s] fault and his claim denied because of this date issue. If there are any questions or concerns you may have about his claim feel free to contact me at the number below. In my mind there is no doubt this is a work[-]related injury.”

In a May 8, 2007 report, Dr. James Grace, a Board-certified orthopedic surgeon, stated:

“In my professional opinion, [appellant’s] superior labral tear of the left shoulder is a work[-]related injury which occurred after lifting flats on January 10, 2005. He felt immediate pain in his left shoulder and discomfort. The shoulder has slowly worsened over time.”

By decision dated June 11, 2007, an Office hearing representative affirmed the January 18, 2007 decision.

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

An employee seeking benefits under the Federal Employees’ Compensation Act<sup>4</sup> has the burden of establishing that 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.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>7</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>8</sup>

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>7</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>8</sup> *Id.* For a definition of the term “injury,” *see* 20 C.F.R. § 10.5(e)(e).

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty,<sup>9</sup> nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and her subsequent course of action.<sup>10</sup> Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee’s statements in determining whether he or she has established his or her claim.<sup>11</sup>

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

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. He alleged in his CA-1 form that he injured his left shoulder on April 28, 2005 while lifting a flat tub container. However, this assertion was contradicted by the December 27, 2006 and February 15, 2007 statements from his supervisor, Mr. Watts. In his December 27, 2006 statement, Mr. Watts indicated that appellant sustained a traumatic injury to his left shoulder on January 10, 2005 and delayed filing his claim until April 28, 2005. Mr. Watts stated that appellant delayed filing his claim because he wanted to wait until he was able to obtain an appointment with his attending physician in order to obtain the proper treatment for his left shoulder; he submitted a supplemental statement on February 15, 2007 in order to clarify that appellant did not sustain a traumatic injury on April 28, 2005.

In addition, the record contains three medical reports indicating that appellant did not sustain a traumatic injury or a new injury on April 28, 2005. Dr. McDowell’s April 28, 2005 report noted that appellant reported to the emergency department that day with complaints of left shoulder pain with range of motion; however, he stated that appellant “had no new trauma” and no numbness, tingling or weakness. In his August 8, 2006 report, Dr. Sliwinski stated that appellant indicated that he did not sustain a specific injury at work. Appellant informed Dr. Sliwinski that he experienced a gradual development of left shoulder pain which eventually induced him to have his shoulder examined in April 2005. Dr. Sliwinski explained that appellant’s left shoulder lesion was not work related because there had been no specific injury and because of the nature of his job. Finally, Dr. Grace stated in his May 8, 2007 report, that appellant sustained a superior labral tear of the left shoulder due to lifting on January 10, 2005.

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<sup>9</sup> *Elaine Pendleton, supra* note 5.

<sup>10</sup> See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

<sup>11</sup> See *Constance G. Patterson*, 42 ECAB 206 (1989).

Appellant can be reasonably imputed to have knowledge of when he sustained an injury that caused him to be medically released from work.<sup>12</sup> This contradictory evidence created an uncertainty as to the time, place and the manner in which appellant sustained his alleged left shoulder injury.

In addition, appellant failed to submit to the Office a corroborating witness statement. This casts additional doubt on his assertion that he strained his left shoulder while lifting a flat tub container on April 28, 2005. Therefore, given the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.<sup>13</sup> The Board therefore affirms the January 18 and June 11, 2007 Office decisions.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under the Act<sup>14</sup> has the burden of establishing that 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.<sup>15</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>16</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 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 usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a

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<sup>12</sup> The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

<sup>13</sup> *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant’s statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

<sup>14</sup> 5 U.S.C. §§ 8101-8193.

<sup>15</sup> *Supra* note 5.

<sup>16</sup> *Victor J. Woodhams*, *supra* note 6.



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.<sup>17</sup>

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>18</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.<sup>19</sup> Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has failed to submit sufficient medical evidence which relates his claimed bilateral shoulder condition to factors of his federal employment. For this reason, appellant has not discharged his burden of proof to establish his claim that his condition was sustained in the performance of duty.

Appellant submitted reports from Dr. Wackwitz, Dr. Hudson and Dr. Judy. However, the reports of these physicians did not provide a probative, rationalized medical opinion that the claimed bilateral shoulder condition was causally related to employment factors. Dr. Wackwitz advised that appellant had some atrophy in the left shoulder, tenderness and impingement sign in the right shoulder and pain in both shoulders which was occasionally worsened with extension. He noted that MRI scan results showed a large posterior shoulder ganglion in the left shoulder, for which he recommended an ameliorative surgical procedure and diagnosed persistent mild right rotator cuff tendinitis. Dr. Hudson noted increasing left shoulder pain attributable to increased use of appellant's left upper extremity. He found no electrophysiological evidence for left upper extremity plexopathy or cervical radiculopathy. Dr. Judy indicated that appellant had developed several upper extremity conditions, including a ganglion cyst in his left shoulder which were caused by overuse at work. He asserted that these were work-related injuries given the nature of appellant's work and in light of reports indicating that he engaged in repetitive motions at work which resulted in adverse effects on his musculoskeletal system over the past two years.

The reports from Dr. Wackwitz, Dr. Hudson and Dr. Judy did not describe appellant's job duties or explain the medical process through which such duties would have been competent to cause the claimed condition. These reports, therefore, are of limited probative value as they do not

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<sup>17</sup> *Id.*

<sup>18</sup> *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

<sup>19</sup> *Id.*

contain sufficient medical rationale explaining how or why appellant's claimed bilateral shoulder condition was caused by or related to factors of his federal employment. Accordingly, he failed to submit medical evidence to establish that his claimed bilateral shoulder condition was causally related to his employment. The Board therefore affirms the Office's December 11, 2006 decision.

Following the December 11, 2006 decision, appellant submitted Dr. Sliwinski's August 8, 2006 report. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of a physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>20</sup> Dr. Sliwinski's report did not present an opinion describing how appellant's work activities caused his claimed bilateral shoulder condition. She advised that appellant had left shoulder pain due to a large multiloculated posterior paralabral cyst and a large superior, anterior and posterior labral tear, but noted there had been no specific injury at work. Dr. Sliwinski noted that appellant had related a gradual onset of left shoulder pain in his left shoulder which stemmed from using his left arm exclusively at work following right carpal release surgery. She noted, however, that his right hand carpal tunnel release had an excellent postoperative result, enabling appellant to return to full-work duties in January 2005 -- three months prior to the onset of his left shoulder symptoms. Based on these facts, Dr. Sliwinski concluded that appellant's right carpal tunnel release had healed extremely well and should not have required any reduced use of the right hand or increased use of the left shoulder or hand after January 2005.

In addition, Dr. Sliwinski noted that appellant was on light duty which did not involve more than an occasional amount of overhead work with the left arm. She therefore concluded that appellant did not sustain a work-related left shoulder injury due to an overuse syndrome or repetitive motion strain; she opined that appellant's left shoulder pain was primarily due to a nonwork-related, large multiloculated posterior paralabral ganglion cyst. Lastly, Dr. Sliwinski stated that, given the nature of his job and without any specific injury, appellant's SLAP lesion was definitely not work related.<sup>21</sup> Thus, although Dr. Sliwinski provided a diagnosis of appellant's left shoulder condition based upon objective medical evidence, he did not relate this diagnosis to factors of appellant's employment; nor did he consider whether appellant's right shoulder condition was causally related to employment factors. Thus, her report did not satisfy appellant's burden of proof to submit medical evidence sufficient to warrant modification of the Office's July 21, 2006 decision.

The Office advised appellant of the evidence required to establish his claim; however, he failed to submit such evidence. Consequently, appellant has not met his burden of proof in establishing that he sustained a bilateral shoulder condition in the performance of duty.

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<sup>20</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>21</sup> Dr. Sliwinski's report did not contain any review or opinions regarding appellant's alleged right shoulder condition.

**CONCLUSION**

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained left shoulder injury in the performance of duty on April 28, 2005.<sup>22</sup> It finds that appellant failed to meet his burden to establish that he sustained an occupational bilateral shoulder condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 11 and January 18, 2007 and December 20 and July 21, 2006 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: February 14, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>22</sup> On appeal, appellant has submitted new evidence. However, the Board cannot consider new evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 20 C.F.R. § 501.2(c).