



and discomfort had never stopped. Appellant first became aware of her condition on November 8, 2006.

By letter dated March 6, 2008, the Office asked appellant to submit additional evidence including a comprehensive medical report from her treating physician with a description of symptoms, the results of tests, a diagnosis and a rationalized medical opinion as to how the condition was causally related to factors of her employment. It asked whether she was claiming a new occupational injury or a recurrence of disability causally related to her prior back injury.<sup>1</sup>

In a report dated October 9, 2007, Dr. Lori B. Siegel, an attending Board-certified internist specializing in rheumatology, stated that she treated appellant for lupus and antiphospholipid syndrome. Regarding her back condition, appellant gave a history of developing back pain in 2002 after she moved a patient. Dr. Siegel noted that a magnetic resonance imaging (MRI) scan revealed a disc herniation on the right and lumbar stenosis.<sup>2</sup> She stated that it was more probable than not that appellant's 2002 disc herniation caused subsequent lumbar stenosis because of the biomechanical alteration of her gait. In an October 30, 2007 report, Dr. Pamela Fennewald, an attending Board-certified internist, stated that she had treated appellant for five years. On August 28, 2002 appellant sustained a back and right shoulder injury while working. She continued to have recurrent bouts of back and shoulder pain. An MRI scan revealed a disc herniation on the right and lumbar stenosis. Dr. Fennewald did not provide an opinion regarding causal relationship. She noted that appellant was also being treated for her back and right shoulder condition by Dr. Siegel and Dr. Roger Chams, an orthopedic surgeon.<sup>3</sup>

By decision dated May 22, 2008, the Office denied appellant's claim on the grounds that the evidence did not establish that her back and right shoulder condition were causally related to factors of her federal employment or her August 28, 2002 employment injury.

By letter dated August 11, 2008, appellant requested reconsideration. She submitted a written statement in which she addressed "the specifics of [her] original injuries." Appellant stated that her injury occurred while she was working the night shift and prior to being hospitalized for another medical condition. She attempted to rise from a chair but her arm slipped. Appellant fell back into the chair and felt a sharp pain in her back and right side. She continued to experience pain and discomfort over the next couple of days. On November 9, 2006 appellant was hospitalized for an unrelated medical condition. While in the hospital, she underwent tests for her back and right shoulder pain. At this time appellant became aware that her original injury caused an aggravation of her back and right shoulder condition.<sup>4</sup>

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<sup>1</sup> The Office indicated that appellant had an accepted claim for a traumatic back injury sustained on August 28, 2002 under OWCP file number xxxxxx067.

<sup>2</sup> The MRI scan is not of record.

<sup>3</sup> There are no reports of record from Dr. Chams.

<sup>4</sup> The Board notes that it is not clear whether appellant is describing the August 28, 2002 injury or an incident that occurred at work just prior to her November 9, 2006 hospitalization.

By decision dated September 17, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.<sup>5</sup>

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

To establish that an injury was sustained in the performance of duty, in a claim for an occupational disease, an employee must submit 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.<sup>6</sup> Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. 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.<sup>7</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that an employee's claimed condition became apparent during a period of employment, nor her belief that her condition was aggravated by her employment, is sufficient to establish causal relationship.<sup>8</sup>

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

In October 2007 reports, Dr. Siegel and Dr. Fennewald diagnosed a disc herniation on the right and lumbar stenosis as conditions sustained on August 28, 2002, the date of appellant's original injury. Dr. Siegel opined that the original injury caused a biomechanical alteration of her gait which aggravated her lumbar stenosis over time. However, he provided insufficient medical rationale explaining how appellant's back and right shoulder conditions in 2007 were causally related to her disc herniation and lumbar stenosis in 2002. Dr. Fennewald also failed to provide medical rationale explaining how appellant's back and right shoulder conditions in 2007 were caused or aggravated by her accepted August 28, 2002 injury.

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<sup>5</sup> Subsequent to the September 17, 2008 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>6</sup> *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

<sup>7</sup> *I.J.*, 59 ECAB \_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>8</sup> *D.I.*, 59 ECAB \_\_\_ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

Appellant was advised by the Office on March 6, 2008 that she needed to submit a comprehensive medical report containing a description of her symptoms, the results of tests and medical rationale explaining how her back and right shoulder injury were causally related to factors of her employment. She did not submit medical evidence meeting the criteria for establishing causal relationship. Consequently, the Office properly denied her claim.

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

Section 8128(a) of the Federal Employees' Compensation Act<sup>9</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>10</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>11</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>12</sup> the Office's regulations provide that the evidence or argument submitted by 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.<sup>13</sup> 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.<sup>14</sup> 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 on the merits.<sup>15</sup>

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

In support of her request for reconsideration, appellant submitted only a written statement describing how her back and right shoulder injury occurred. As noted, an award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during her employment, nor her belief that her condition was aggravated by her employment, is sufficient to establish causal relationship. The Office denied her claim on May 22, 2008 because she failed to submit medical evidence establishing causal relationship. Appellant did not submit relevant and pertinent new medical evidence in support of her reconsideration request. Because she did not submit evidence or

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<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> *Id.* at § 8128(a).

<sup>11</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>12</sup> Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> *Id.* at § 10.607(a).

<sup>15</sup> *Id.* at § 10.608(b).

argument that showed that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered or constituted relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her request for reconsideration.

**CONCLUSION**

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a back and right shoulder occupational injury in the performance of duty. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 17 and May 22, 2008 are affirmed.

Issued: August 26, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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