



before March 3, 1989.<sup>1</sup> He underwent right shoulder arthroscopy in January 1991. Appellant's position required lifting, pulling and pushing from 60 to 75 pounds, working above shoulder height and exerting pressure to turn large valves.

In an August 7, 2007 letter, the Office advised appellant of the medical and factual evidence needed to establish his claim. It requested that he submit a rationalized report from his attending physician explaining how and why work factors would cause the claimed condition.

In July 3, 1996 and March 1, 2007 reports, Dr. Charles Howell, an employing establishment physician, diagnosed C4-5 spondylosis and prescribed light duty.<sup>2</sup> Dr. John Murphy, an attending Board-certified orthopedic surgeon, submitted reports from May 31, 2006 to January 21, 2007 noting a history of right shoulder arthroscopy with pain on reaching and pulling at work. Appellant's symptoms improved with conservative treatment.

By November 2, 2007 decision, the Office denied the claim on the grounds that causal relationship was not established. It found that appellant submitted insufficient medical evidence explaining how and why the identified work factors would cause the claimed right shoulder condition.

In a November 28, 2007 form, appellant requested reconsideration. He did not submit any additional evidence.

By decision dated December 21, 2007, the Office denied merit review on the grounds that appellant's November 23, 2007 letter did not raise substantive legal questions or include new, relevant evidence.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>4</sup> These are the essential

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<sup>1</sup> The Office assigned the July 16, 2007 claim File No. xxxxxx051. It accepted a right shoulder condition sustained on or before March 3, 1989 under File No. xxxxxx775. File No. xxxxxx775 is not before the Board on the present appeal. As of August 3, 2007, appellant also claimed a recurrence of disability under File No. xxxxxx398, regarding a neck injury.

<sup>2</sup> Appellant also submitted occupational health clinic nurse's notes dated from June 1994 to September 1999.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>5</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) 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 medial 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>6</sup>

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

Appellant claimed that he sustained a right shoulder condition due to work factors on or before March 3, 1989. He submitted medical reports indicating a history of right shoulder arthroscopy. Appellant's job entailed heavy lifting and overhead reaching. However, he did not submit sufficient rationalized medical evidence explaining how and why work factors would cause or contribute to his right shoulder condition.

Dr. Howell, an employing establishment physician, did not discuss appellant's right shoulder. Dr. Murphy, an attending Board-certified orthopedic surgeon, related appellant's account of right shoulder pain while reaching and pulling at work. However, he did not address how work factors caused or aggravated the claimed right shoulder condition. Dr. Murphy's opinion is insufficiently rationalized to establish causal relationship.<sup>7</sup> The Board notes that pain is considered a symptom, not a diagnosis and does not constitute a basis for payment of compensation.<sup>8</sup>

The Board notes that appellant was advised by the August 7, 2007 Office letter of the necessity of submitting medical evidence explaining how and why work factors would cause or

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<sup>5</sup> See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>6</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>7</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003) (medical reports not containing rationale on causal relationship are entitled to little probative value).

<sup>8</sup> See *Robert Broome*, 55 ECAB 339 (2004).

contribute to the claimed shoulder condition. Appellant did not submit such evidence. Therefore, he failed to meet his burden of proof in establishing causal relationship.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>9</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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.<sup>10</sup> 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.<sup>11</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>12</sup> Appellant need only submit relevant, pertinent evidence not previously considered by the Office.<sup>13</sup> 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.<sup>14</sup>

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

The Office denied appellant's occupational disease claim by November 2, 2007 decision. Appellant requested reconsideration by November 28, 2007 form. He did not submit additional evidence or argument. Appellant merely checked a box on the form indicating that he requested reconsideration.

Appellant's November 28, 2007 form, the only evidence submitted in support of his request for reconsideration, does not establish that the Office improperly refused to reopen his claim for a review of the merits under section 8128(a) of the Act. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied appellant's request for a merit review.

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<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> 20 C.F.R. § 10.608(b). *See also T.E.*, 59 ECAB \_\_\_\_ (Docket No. 07-2227, issued March 19, 2008).

<sup>12</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>13</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>14</sup> *Annette Louise*, 54 ECAB 783 (2003).

**CONCLUSION**

The Board finds that appellant has not established that he sustained a right shoulder condition in the performance of duty. The Board further finds that the Office properly denied appellant's November 28, 2007 request for a merit review.

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 21 and November 2, 2007 are affirmed.

Issued: January 15, 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