

FACTUAL HISTORY

On December 26, 2007 appellant, then a 41-year-old automation clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 14, 2007 she sustained a left arm strain from lifting a container of mail while sweeping. She claimed that she was overcompensating with her left arm due to a prior right arm injury.¹ Appellant did not stop working.

In a December 7, 2007 medical form, Dr. Randy Western, Board-certified in family medicine, diagnosed a rotator cuff tear. He stated that appellant's left chest wall was tender and worsened when she moved her shoulder. Dr. Western indicated with a check mark that appellant provided a consistent history that she injured her left arm while carrying a tray full of mail. He stated that she could work light duty without use of her left arm.

In a letter dated January 7, 2008, the Office notified appellant of the deficiencies in her claim and requested that she provide additional evidence. Appellant did not provide any additional evidence within the time allotted.

By decision dated February 6, 2008, the Office denied appellant's claim on the grounds that she did not submit medical evidence providing a compensable diagnosis that could be connected to her employment incident of November 14, 2007.

In a January 22, 2008 note, Dr. Tomasz W. Borowiecki, a Board-certified orthopedic surgeon, prescribed a magnetic resonance imaging (MRI) scan of the left shoulder due to arm pain from a November 14, 2007 injury. Further, in a January 22, 2008 medical form, he provided light-duty work restrictions.

In a medical report dated January 30, 2008, Dr. Western stated that he first treated appellant for a left shoulder injury on November 15, 2008 and after several more visits without resolution, he referred her to Dr. Borowiecki who diagnosed a shoulder injury with possible rotator cuff sprain. Dr. Borowiecki relayed appellant's report that she injured her left shoulder while lifting a tub at work. Physical examination revealed anterior pain on palpitation of the left shoulder.

On February 19, 2008 appellant filed a request for reconsideration.

By decision dated March 5, 2008, the Office denied modification of the February 6, 2008 decision. It found that appellant did not submit sufficient medical evidence to establish that she sustained a left shoulder injury causally related to her November 14, 2007 employment incident.

In a December 20, 2007 medical report, Dr. Western relayed appellant's complaints that her left shoulder injury had not improved despite work restrictions. Physical examination of the left shoulder revealed tenderness within the pectoralis muscle. Appellant also complained of bilateral medial pain or golfer's elbow, which was confirmed by point tenderness in the medial epicondyle bilaterally. Dr. Western recommended physical therapy and referred her back to Dr. Borowiecki.

¹ Appellant has a separate claim for a July 3, 2006 right arm injury under Office file number xxxxxx655.

In a January 22, 2008 medical report, Dr. Borowiecki reported that appellant experienced a pop in the anterior aspect of her left shoulder on November 14, 2007 while lifting a bin at work and trying to off load her right side. Appellant reported that, at the time of her injury, she felt a sharp, stabbing pain and pop in the area with persisting pain. December 3, 2007 x-rays of the left shoulder were unremarkable for any active fractures or dislocations. Physical examination revealed pain anteriorly on the left side with a component of impingement. Dr. Borowiecki noted tenderness over the bicipital groove area of the left side. Appellant demonstrated good overall strength in the rotator cuff. Her biceps appeared to be symmetrical with pain centered mainly in the proximal biceps tendon. Dr. Borowiecki diagnosed left shoulder work injury while lifting, with symptoms in the primal biceps and possibly the rotator cuff.

On April 14, 2008 appellant filed a request for reconsideration.

By decision dated May 7, 2008, the Office denied modification of the prior decisions finding that the medical evidence was insufficient to establish that appellant sustained a left shoulder injury causally related to the November 14, 2007 employment incident. It noted that the December 20, 2007 medical report from Dr. Western did not address causation and that Dr. Borowiecki's January 22, 2008 medical report did not provide a compensable diagnosis.

On June 20, 2008 appellant filed a request for reconsideration.

In a May 20, 2008 medical report, Dr. Borowiecki stated that he did not understand why appellant's claim was denied in light of Dr. Western's clinic notes and his medical reports, which clearly described a work-related injury. He stated that he needed approval of the claim in order to proceed with the recommended MRI scan to confirm his suspicion of a possible rotator cuff tear in the left shoulder. Dr. Borowiecki noted that a diagnosis of rotator cuff tear could not be made with any accuracy on the basis of a clinical examination unless the tear was massive with marked weakness. He opined that appellant's lack of these symptoms did not rule out the presence of a rotator cuff or bicipital tendon injury. Dr. Borowiecki stated that the Office's denial was inaccurate and that the previous medical reports by two different physicians were sufficient documentation of an injury occurring by a specific mechanism of the left shoulder.

Appellant further submitted a duplicate copy of Dr. Western's December 20, 2007 medical report.

By decision dated September 15, 2008, the Office denied appellant's request for reconsideration on the grounds that she did not submit new evidence relevant to the instant issue of whether she sustained an injury causally related to her employment. It noted that, although Dr. Borowiecki's medical report constituted new evidence and was not previously considered, it did not provide a diagnosis and did not address whether the November 14, 2007 employment incident caused an injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of her claim by the weight of the reliable,

² 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,³ including that she is an “employee” within the meaning of the Act⁴ and that she filed her claim within the applicable time limitation.⁵ The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. 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.⁷ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion 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.⁹

ANALYSIS -- ISSUE 1

The issue is whether appellant established that she sustained a left arm injury on November 14, 2007 while in the performance of duty. The Board finds that she has not met her burden of proof.

In support of her claim, appellant submitted a December 7, 2007 medical form from Dr. Western, who diagnosed rotator cuff tear. Dr. Western indicated with a check mark that appellant provided a consistent history that she injured her left arm while carrying a full tray of

³ *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁴ *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁵ *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O’Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁶ *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁸ *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁹ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

mail. This report is insufficient to establish appellant's claim. The Board has held that when a physician's opinion on causal relationship consists only of a check mark on a form, without more by way of medical rationale, the opinion is of diminished probative value.¹⁰ As Dr. Western did not provide a fully rationalized opinion explaining how appellant's rotator cuff tear was related to her employment injury, this report is of diminished probative value.¹¹

In a medical report dated December 20, 2007, Dr. Western relayed appellant's complaints of unresolved left shoulder pain. Physical examination of the left shoulder revealed tenderness within the pectoralis muscle and bilateral medial epicondyle. Further, in a January 30, 2008 medical report, Dr. Western stated that he first treated appellant for a left shoulder injury on November 15, 2008 and that he referred her to Dr. Borowiecki after the injury did not resolve. He diagnosed shoulder injury with possible rotator cuff sprain and relayed appellant's report that she injured her left shoulder while lifting a tub at work. These reports are similarly insufficient to establish appellant's claim as Dr. Western failed to provide an opinion on causation. Although he relayed appellant's complaints that she injured her left shoulder at work, an employee's belief that the employment caused her condition is insufficient to establish causal relationship.¹² Dr. Western did not provide a medical opinion as to the cause of appellant's condition or explain how it was caused by her employment. Thus, these reports are of diminished probative value.¹³

Further, appellant submitted a January 22, 2008 note from Dr. Borowiecki prescribing an MRI scan for left shoulder pain due to a November 14, 2007 injury and a work capacity evaluation providing light-duty restrictions. Neither of these documents provide a diagnosis or a medical opinion relating appellant's left shoulder injury to her employment. Thus, they are of diminished probative value.¹⁴

Finally, appellant submitted a January 22, 2008 medical report from Dr. Borowiecki, who reported that appellant experienced a pop in the anterior aspect of her left shoulder on November 14, 2007 while lifting a bin at work and trying to off load her right side. Dr. Borowiecki diagnosed a left shoulder work injury from lifting with symptoms in the primal biceps and possibly the rotator cuff. This report is also of diminished probative value. Although Dr. Borowiecki reported that appellant injured herself at work, he did not provide a rationalized medical opinion explaining how the mechanisms of lifting a bin and trying to off load her right side caused a left shoulder injury.¹⁵ Further, he did not provide a diagnosis of appellant's left shoulder condition.¹⁶

¹⁰ See *Gary J. Watling*, 52 ECAB 278 (2001).

¹¹ See *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

¹² See *Frederick H. Coward, Jr.*, 41 ECAB 842 (1990).

¹³ See *Robert Broome*, 55 ECAB 339 (2004).

¹⁴ See *Daniel O. Vasquez*, 57 ECAB 559 (2006).

¹⁵ See *Michael S. Mina*, 57 ECAB 379 (2006).

¹⁶ See *Daniel O. Vasquez*, *supra* note 14.

The Board finds that appellant did not submit a medical report containing a diagnosis and a complete, rationalized explanation as to how the diagnosed condition was caused by her November 14, 2007 employment incident. Thus, she has not established her claim.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹⁸ 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.¹⁹ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).²⁰

To require the Office to reopen a case for merit review under section 8128(a) of the Act,²¹ 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.²² 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.²³ 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.²⁴

ANALYSIS -- ISSUE 2

The issue is whether the Office properly denied merit review pursuant to 5 U.S.C. § 8128(a). Appellant did not raise a relevant legal argument not previously considered or show that the Office erroneously interpreted a specific point of law. Thus, the issue is whether she submitted relevant and pertinent new evidence.

In support of her reconsideration request, appellant submitted a May 20, 2008 medical report from Dr. Borowiecki which stated that the Office incorrectly denied appellant's claim and maintained that the medical documentation provided by himself and Dr. Western clearly described appellant's work-related injury. Dr. Borowiecki further stated that he needed approval of the claim in order to proceed with an MRI scan to confirm a diagnosis of rotator cuff tear.

¹⁷ See *David Apgar*, 57 ECAB 137 (2005).

¹⁸ 5 U.S.C. §§ 8101-8193.

¹⁹ *Id.* at § 8128(a).

²⁰ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

²¹ 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).

²² 20 C.F.R. § 10.606(b)(2).

²³ *Id.* at § 10.607(a).

²⁴ *Id.* at § 10.608(b).

The Board finds that the May 20, 2008 medical report does not constitute pertinent new evidence relevant to the instant issue of whether appellant sustained an injury causally related to lifting a tray at work on November 14, 2007. Dr. Borowiecki only argued that the prior medical reports submitted by himself and Dr. Western should be sufficient to establish the work-related nature of appellant's claim. Dr. Borowiecki did not provide a firm diagnosis of appellant's condition or discuss any new medical findings. Further, he did not provide any additional opinions regarding her left shoulder condition or its relationship to her employment injury. Thus, this report is not sufficient to warrant a reopening of the case.²⁵

Appellant further submitted a duplicate copy of Dr. Western's December 20, 2007 medical report. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²⁶

The Board finds that appellant did not submit any relevant and pertinent new evidence to support her reconsideration request. Therefore, the Office properly denied merit review.

On appeal, appellant contends that she was not provided enough time to secure proper documentation from her treating physician prior to the Office's decision. She also submitted several additional medical reports from her treating physician. Pursuant to 20 C.F.R. § 501.2(c), the Board is precluded from reviewing new evidence for the first time on appeal. However, appellant may submit the additional evidence to the Office with a formal, written request for reconsideration under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.²⁷

CONCLUSION

The Board finds that appellant did not establish that she sustained a left arm injury on November 14, 2007 in the performance of duty. The Board also finds that the Office properly denied appellant's request for merit review pursuant to 5 U.S.C. § 8128(a).

²⁵ The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case for merit review. See *Bonnie A. Contreras*, 57 ECAB 364 (2006). See also *Susan A. Filkins*, 57 ECAB 630 (2006).

²⁶ See *Johnny B. Causey*, 57 ECAB 359 (2006).

²⁷ See *A.L.*, 60 ECAB ____ (Docket No. 08-1730, issued March 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the September 15 and May 7, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 7, 2010
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