

complaints of harassment by Eric Rowe, including destroying equipment and pouring machine coolant into her coffee cup. Mr. Rowe left a note accusing appellant of taking someone else's coffee cup and noting that coolant was left in the cup for two days.

On March 10, 2009 the employing establishment controverted appellant's claim, noting that she did not drink the coolant in the coffee cup. Appellant stated that the smell of the liquid in the cup would cause anyone who operated machinery to suspect there was coolant in it. She reported the incident to her supervisor and then cleaned the cup before using it.

On April 1, 2009 the Office asked appellant to provide additional factual and medical information, including a comprehensive medical report with medical rationale addressing causal relationship of her throat condition to factors of her federal employment.

In an August 27, 2008 report, Dr. H.J. MacDonald, Jr., an attending physician, provided findings on physical examination of her nose, mouth and throat. A computerized tomography (CT) scan revealed enlargement in the base of the tongue region. Appellant stopped smoking in February 2008. Dr. MacDonald made a tentative diagnosis of lingual tonsillitis and proposed a tonsillectomy and, to rule out pathology caused by smoking, a biopsy of the base of the tongue.

On February 17, 2009 Dr. Kristina Gintautiene, an attending Board-certified internist, stated that she began treating appellant for throat problems in August 2008. Appellant underwent surgery in September 2008 and had a good result. In December 2008, she reported throat pain.

In a January 19, 2009 report, Dr. Paul S. Camnitz, a Board-certified otolaryngologist, noted that appellant had a three- or four-month history of throat discomfort. Appellant had a tonsillectomy in September 2008 but experienced a worsening of her symptoms later. She advised that she drank an unknown chemical at work that exacerbated her symptoms. Appellant also had a history of reflux. Dr. Camnitz provided findings on physical examination and an impression of persistent left-sided throat discomfort. An abnormal CT scan revealed a subtle, asymmetric soft tissue mass in the left tonsillar area. Dr. Camnitz scheduled a left radical tonsillectomy. On February 16, 2009 he advised that the surgical pathology report revealed chronic inflammation and fungus. There was no evidence of atypia. Appellant did well following surgery. On April 9, 2009 she told Dr. Camnitz that she had a rash on her tongue. Dr. Camnitz advised that what appellant saw was normal papillae of the tongue. Physical examination of her mouth and throat was normal.

By decision dated July 7, 2009, the Office denied appellant's claim for a throat condition, finding that the evidence did not establish that it was causally related to her employment.

Appellant requested a review of the written record. By decision dated November 17, 2009, an Office hearing representative affirmed the July 7, 2009 decision.

Appellant requested reconsideration. She argued that the evidence was sufficient to establish that she drank coolant from the coffee cup. Appellant argued that a grinder she used in her work had a malfunctioning mist collector that also could have caused her throat condition. In one page from the transcript of an Equal Employment Opportunity Commission (EEOC) hearing, Debra Bautista, a division director, stated that on December 1, 2008 appellant alleged

for the first time that she drank some of the coolant in the coffee cup. In a December 12, 2008 statement, Eric Wortham advised that Mr. Rowe told him that he had dipped the coffee cup used by appellant into coolant at least three times. The cup was Mr. Rowe's and he was upset when he saw it at her workstation. He put the cup in the coolant tank upside down and then shook it, leaving only a residue or film on the cup.

By decision dated February 5, 2010, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, 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.¹ 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.²

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.³

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet her burden of proof in establishing that her throat condition was causally related to factors of her employment.

Dr. MacDonald provided findings on physical examination of appellant's nose, mouth and throat. A CT scan revealed enlargement in the base of the tongue region. Appellant stopped smoking in February 2008. Dr. MacDonald made a tentative diagnosis of lingual tonsillitis. He did not provide a rationalized opinion explaining the cause of appellant's condition.

¹ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

² *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

³ *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

Dr. MacDonald's report is not sufficient to establish that her throat condition was caused or aggravated by exposure to coolant or any other employment factor.

Dr. Gintautiene began treating appellant for throat problems in August 2008. Appellant underwent surgery in September 2008 and had a good result. In December 2008, she reported throat pain. Dr. Gintautiene did not provide a rationalized opinion explaining the cause of appellant's throat pain. Her report is not sufficient to establish that appellant's throat condition was caused or aggravated by exposure to coolant or any other employment factor.

On January 19, 2009 Dr. Camnitz noted that appellant had a three- or four-month history of throat discomfort. Appellant had a tonsillectomy in September 2008 but experienced a worsening of her symptoms later. Dr. Camnitz advised that she drank a chemical at work that exacerbated her symptoms. He noted that appellant also had a history of reflux. A CT scan revealed a soft tissue mass in the left tonsillar area for which she underwent a left radical tonsillectomy. On February 16, 2009 Dr. Camnitz advised that the pathology report revealed chronic inflammation and fungus. He did not, however, provide a rationalized opinion explaining the cause of these conditions. On April 9, 2009 appellant told Dr. Camnitz that she had a rash on her tongue. Dr. Camnitz found normal tongue papillae and physical examination of her mouth and throat was normal. Because he did not provide a rationalized opinion explaining the cause of the throat conditions in the pathology report, his reports are not sufficient to establish that these conditions were caused or aggravated by exposure to coolant or any other employment factor.

There is no comprehensive medical report of record, based on a complete and accurate factual background, containing physical findings, objective test results and a rationalized opinion as to how appellant's throat condition was caused or aggravated by employment factors. Appellant failed to meet her burden of proof. The Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act⁴ 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. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ 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

⁴ 5 U.S.C. § 8128(a).

⁵ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 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).

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 on the merits.⁹

ANALYSIS -- ISSUE 2

Appellant argued that the evidence was sufficient to establish that she drank coolant from the coffee cup. She argued that a grinder she used in her work had a malfunctioning mist collector that could have caused her throat condition. In an EEOC hearing transcript, Ms. Bautista stated that on December 1, 2008 appellant alleged for the first time that she drank some of the coolant in the coffee cup. In a December 12, 2008 statement, Mr. Wortham reported that Mr. Rowe told him that he had dipped the coffee cup used by appellant into coolant and then shook it, leaving only a residue or film on the cup. The issue in this case is medical, whether her throat condition was caused by factors of her employment. The evidence submitted on reconsideration is not rationalized medical evidence addressing causal relationship. Therefore, it does not constitute relevant and pertinent new evidence not previously considered by the Office. Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, the Office did not abuse its discretion in denying her request for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof in establishing that her throat condition was causally related to factors of her employment. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 5, 2010 and November 17, 2009 are affirmed.

Issued: December 7, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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