

FACTUAL HISTORY

On November 11, 2009 appellant, then a 39-year-old food inspector, filed an occupational disease claim alleging that he sustained a right shoulder condition due to repetitive activities required in his job.

In a November 11, 2009 report, Dr. John A. McCarthy, a Board-certified orthopedic surgeon, noted a diagnosis of right shoulder rotator cuff tendinitis. Appellant was released to regular work as of November 12, 2009.

On November 20, 2009 the Office asked appellant to provide additional factual and medical information, including a comprehensive medical report with medical rationale addressing causal relationship of his right shoulder condition to factors of his federal employment.

By decision dated December 30, 2009, the Office denied appellant's claim for a right shoulder condition, finding that the evidence did not establish that it was causally related to his employment.

Appellant requested reconsideration. In a second report dated November 11, 2009, Dr. McCarthy provided a description of appellant's job duties and findings on physical examination. He stated that appellant's job duties required that he rotate between different positions while inspecting meat processing businesses. Dr. McCarthy stated that appellant was often reaching and grasping, that appellant had to use a knife and that appellant had to perform the work activities in an extended position. He diagnosed impingement of the right shoulder with bursitis tendinitis, a possible right rotator cuff tear and possible biceps tenosynovitis. Right shoulder x-rays did not reveal any degenerative joint disease. Appellant was able to perform regular duty.

By decision dated February 1, 2010, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted did not warrant further merit review.² The decision noted that the new medical evidence did not link the diagnosed condition to appellant's work duties.

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

² Subsequent to the February 1, 2010 Office decision, additional evidence was associated with the file. 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.

identified by the employee.³ 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.⁴

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 his belief that his condition was aggravated by his employment, is sufficient to establish causal relationship.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet his burden of proof to establish that his right shoulder condition was causally related to factors of his employment.

Dr. McCarthy diagnosed right shoulder rotator cuff tendinitis. He did not provide any opinion explaining how this condition was causally related to appellant's job duties. Dr. McCarthy's report is not sufficient to establish that appellant's right shoulder condition was caused or aggravated by his federal employment.

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 right shoulder condition was caused or aggravated by employment factors. He failed to meet his burden of proof. The Office properly denied his claim.

On appeal appellant contends that the Office denied his claim "without proper paperwork/documentation." He received contradictory claim instructions and information from the Office. Appellant contended that his job was the only possible cause for his right shoulder condition. The issue is whether the medical evidence establishes that the right shoulder condition was caused or aggravated by his job duties. The administrative processing of his claim and his opinion as to causal relationship do not constitute medical evidence. As noted, the medical evidence is insufficient to establish causal relationship.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act⁶ 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

³ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

⁴ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁵ *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

⁶ 5 U.S.C. § 8128(a).

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).⁷

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁸ 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.⁹ 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.¹⁰ 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.¹¹

It is well established that the requirement for reopening a claim for further merit review before the Office does not include the necessity that the claimant submit all evidence necessary to discharge his or her burden of proof. Rather, the requirement for reopening a case specifies only that the evidence be relevant, pertinent and not previously considered by the Office. The presentation of such new evidence creates the necessity for review of the full case record in order to properly determine whether the newly submitted evidence would warrant modification of an earlier decision. Analyzing whether a claimant established causal relationship is not the proper standard for determining whether a case should be reopened for merit review. Rather, it is a standard applicable when conducting a merit review.¹²

ANALYSIS -- ISSUE 2

The Board finds that appellant submitted new and relevant evidence in support of his request for reconsideration.

The medical evidence appellant submitted on reconsideration was a second report from Dr. McCarthy. Both reports from Dr. McCarthy are dated November 11, 2009, however, the report received by the Office on January 25, 2010 with the reconsideration request offered much greater detail regarding appellant's work activities; noting that rotation, reaching, grasping and extended position were required in his work. This new report also added detail regarding appellant's current medical status. Dr. McCarthy provided findings on physical examination, addressed diagnostic x-rays and diagnosed impingement of the right shoulder with bursitis tendinitis. To obtain a merit review the evidence submitted in support of reconsideration must be

⁷ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁸ 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).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(b).

¹² *See F.D. (S.D.)*, 58 ECAB 413 (2007).

new and relevant to the claim. The report from Dr. McCarthy received by the Office on January 25, 2010 added many facts to the medical evidence regarding appellant's job duties and his medical condition, it was new and relevant evidence.

On remand of the case, the Office shall conduct a merit review of the claim.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that his right shoulder condition was causally related to factors of his employment. The Board further finds that the Office abused its discretion in denying his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2010 be set aside and the decision of the Office dated December 30, 2009 be affirmed. The case is remanded for further action consistent with this decision.

Issued: April 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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