



## **FACTUAL HISTORY**

On February 19, 2009 appellant, then a 64-year-old legal clerk and technician, filed a traumatic injury claim (Form CA-1) alleging that on January 22, 2009 she felt a sharp pain on her right shoulder when she was reaching for a file on top of the filing cabinet. She claimed and sustained a tear of the glenoid labrum, tendinitis and bursitis. Appellant first received medical care on February 2, 2009.

By letter dated February 9, 2010, the Office informed appellant that no evidence had been received in support of her claim. It requested additional factual and medical evidence and asked that she respond to the provided questions within 30 days.

In a factual statement dated February 17, 2010, appellant stated that her injury occurred when she was reaching for a file on top of a filing cabinet. She felt a sharp right shoulder pain and was unable to drop her right arm down. Appellant reported the incident to her supervisor on February 19, 2009. She delayed medical treatment because she hoped the pain would go away. On February 2, 2009 appellant saw Dr. Edward Pyune, Board-certified in family medicine. She was unable to use her right arm and stayed at home for four days. Appellant used a sling, applied medicinal cream daily and used a heating pad. She stated that she had no similar disability or symptoms before this injury. Appellant noted that she was waiting for a report from a Dr. Tapadiya, an orthopedic surgeon. She indicated that she attached the original injury report and a magnetic resonance imaging (MRI) scan report with her statement; but these reports are not of records.

By decision dated March 17, 2010, the Office denied appellant's claim finding that she did not establish that she sustained an injury. It found that she did not submit any medical evidence.

On March 29, 2010 appellant requested reconsideration, stating that a medical evaluation from Dr. Tapadiya was forthcoming. No medical evidence was received.

By decision dated April 20, 2010, the Office denied appellant's request for reconsideration finding that she did not raise substantive legal questions or include any new and relevant evidence. It noted that no medical evidence was ever submitted.<sup>2</sup>

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

An employee seeking benefits under the 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

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<sup>2</sup> The Board notes that appellant submitted additional evidence after the Office rendered its April 20, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

States” within the meaning of the Act, that the claim was filed within the applicable time limitation period of the Act<sup>4</sup> and that an injury was sustained in the performance of duty.<sup>5</sup> These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. She must also establish that such event, incident or exposure caused an injury.<sup>7</sup> Once an employee establishes that she sustained an injury in the performance of duty, she has the burden of proof to establish that any subsequent medical condition or disability for work, for which she claims compensation is causally related to the accepted injury.<sup>8</sup>

### ANALYSIS -- ISSUE 1

The Office accepted that the incident occurred as alleged when appellant reached for a case file with her right arm on January 22, 2009. The issue, therefore, is whether appellant submitted sufficient medical evidence to establish that the employment incident caused an injury. She submitted no medical evidence in support of her claim prior to the Office’s March 17, 2010 decision denying her claim.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a tear of the glenoid labrum, tendinitis or bursitis of the right shoulder in the performance of duty. Appellant’s claim simply recounted the incident as alleged by her, that she felt a sharp pain in her right shoulder when reaching for a case file. In a letter dated February 9, 2010, the Office informed her of detailed medical and factual evidence needed to support her claim. Appellant responded on February 17, 2010 that she was unable to use her right arm after the incident and delayed medical treatment until February 2, 2009 to see if the pain would cease. Although advised to submit medical evidence to support her claim, the record before the Board contains none. Appellant has failed to establish a *prime facie* claim for compensation.<sup>9</sup>

An award of compensation may not be based on surmise, conjecture or speculation.<sup>10</sup> To establish causal relationship, appellant must submit a report in which a physician reviews those

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

<sup>5</sup> *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *Delores C. Ellyett*, 41 ECAB 992 (1990).

<sup>7</sup> *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) (regarding a claimant’s burden of proof in an occupational disease claim).

<sup>8</sup> *Elaine Pendleton*, 40 ECAB 1143-45 (1989).

<sup>9</sup> *See Donald W. Wengel*, 56 ECAB 390-93(2005).

<sup>10</sup> *D.D.*, 57 ECAB 734 (2006).

factors of employment alleged to have caused her condition and, taking these factors into consideration, as well as findings upon examination and appellant's medical history, explain how the incident of January 22, 2009 caused or aggravated a diagnosed condition, and present medical rationale in support of his opinion.<sup>11</sup> Her recitation of the facts does not support her allegation that reaching for a case file caused her injury.<sup>12</sup> Where an appellant fails to submit any medical evidence, he or she has not established that the injury occurred as alleged.<sup>13</sup>

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act, 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>14</sup> Section 10.608(b) of Office regulations provide that when an application for reconsideration 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>15</sup>

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

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In her March 29, 2010 reconsideration request, appellant stated that she was submitting a medical evaluation from Dr. Tapadiya. However, no report from Dr. Tapadiya appears in the record before the Board. There is no indication that any such report was received prior to the Office's April 20, 2010 decision. Thus, appellant failed to submit relevant and pertinent new evidence not previously considered by the Office. Further, her brief statement in support of the reconsideration request did not establish that the Office erroneously applied or misinterpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.<sup>16</sup>

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<sup>11</sup> *Robert Broome*, 55 ECAB 339 (2004).

<sup>12</sup> *Paul Foster*, 56 ECAB 1943 (2004); *Dennis M. Mascarenas*, 49 ECAB 215-18 (1997).

<sup>13</sup> *Tracey P. Spillane*, 54 ECAB 608 (2003); 5 U.S.C. § 8101(5).

<sup>14</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>15</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>16</sup> *Sherry A. Hunt*, 49 ECAB 467 (1998).

Because appellant's April 20, 2010 application for reconsideration failed to meet any of the three standards for obtaining a merit review of her claim under section 8128(a) of the Act, the Board will affirm the denial of the reconsideration request.<sup>17</sup>

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty. The Office properly denied her request for reconsideration without a merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated April 20 and March 17, 2010 are affirmed.

Issued: March 3, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>17</sup> *Id.*