

**United States Department of Labor
Employees' Compensation Appeals Board**

S.J., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Augusta, GA, Employer**

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**Docket No. 10-1832
Issued: May 6, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2010 appellant filed a timely appeal from the May 17, 2010 merit decision of the Office of Workers' Compensation Programs, which denied her occupational disease claim, and the June 10, 2010 nonmerit decision, which denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act,¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that her right shoulder condition was causally related to her employment; and (2) whether the Office properly denied appellant's May 27, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 19, 2010 appellant, then a 59-year-old nurse, filed an occupational disease claim alleging that she sustained a right shoulder rotator cuff tear as a result of frequently lifting and repositioning patients at work. She first became aware of her condition on October 19, 2009 but did not realize it was causally related to her employment until December 30, 2009. Appellant stated that she failed to file the Form CA-2 within 30 days because she did not realize the extent of her injury until she was seen by an orthopedic surgeon who advised her that she could not return to work because she needed surgery. She stopped work on December 29, 2009 and returned on March 8, 2010.

Appellant provided a description of her job duties as a registered nurse, which included assisting patients with getting undressed and into bed for initial examination, placing patients on monitors, orienting patients to rooms, arranging for special needs, assessing and completing admission templates, and providing feed back to other nursing staff.

Appellant provided chart notes from Dr. Edwin H. Scott, a Board-certified family practitioner. In an October 19, 2009 note, Dr. Scott stated that appellant complained that her right shoulder was giving her more pain but reported no trauma. Appellant's arm was heavy and she also had trouble abducting it. Dr. Scott reviewed appellant's medical and social background and diagnosed her with a rotator cuff tear along with several other conditions. In a December 12, 2009 note, he again reported appellant's complaints of shoulder pain, particularly while working and getting dressed. Dr. Scott reiterated his diagnosis of rotator cuff tear.

On December 16, 2009 appellant was seen by Dr. David Minter, a Board-certified orthopedic surgeon, who informed Dr. Scott *via* a letter that appellant had significant acromioclavicular/degenerative joint disease (AC/DJD), a large acromial spur, and possible cuff tear and that he anticipated operative intervention of the right shoulder.

On December 17, 2009 Dr. Hunter B. Nelson, conducted a magnetic resonance imaging (MRI) scan examination of appellant's right shoulder. He noted that appellant had a history of shoulder pain and AC joint hypertrophy with superior and inferior spurring and a full-thickness tendon tear with the tendon gap measuring approximately 2 centimeters in largest coronal dimension and 1.5 centimeter in largest sagittal dimension. Dr. Nelson concluded that appellant sustained a full-thickness tear of the supraspinatus tendon with tendon gap and retracted tendon edge, AC joint hypertrophy and spurring, large joint effusion, and some intrasubstance tearing or tendinosis.

In a December 30, 2009 work excuse note, Dr. Minter stated that appellant was seen in his office that day for shoulder pain. He noted that appellant was scheduled for surgery on January 11, 2010 and should remain out of work until approximately March 18, 2010. In another letter dated that same day, Dr. Minter informed Dr. Scott that appellant had right shoulder AC/DJD and a large rotator cuff tear and was scheduled for an AC resection and rotator cuff repair in the near future.

On January 11, 2010 Dr. Minter performed a rotator cuff repair and AC resection of appellant's right shoulder. In the postoperative report, she was directed to keep her shoulder

immobilized at all times and to take all her medications as directed. In a February 10, 2010 progress note, he observed that appellant was recovering well from her shoulder surgery with no signs of infection and improved shoulder motion.

According to a March 3, 2010 form, the employing establishment was advised that appellant may return to work on March 9, 2010 with certain restrictions. In an April 14, 2010 work excuse slip, Dr. Minter stated that appellant could return to full-duty status but was restricted from lifting no more than 20 pounds for six weeks. He also provided a duty status report which contained appellant's diagnosis of rotator cuff tear and stated that she injured her shoulder and required surgical correction.

On March 30, 2010 the Office advised appellant that the evidence submitted was insufficient to determine her claim. It requested she provide in detail any additional employment-related activities she believed contributed to her condition, how often she performed the activities described and for how long on each occasion, any previous orthopedic injuries, and all activities outside of her federal employment. The Office also requested a comprehensive medical report from a physician which included a description of appellant's symptoms and treatment given, examination and test results, diagnosis, and an opinion, based on stated medical reasons, regarding whether her claimed condition resulted from factors of her employment.

On April 15, 2010 appellant responded to the Office's development letter. She stated that she was a critical care unit nurse who worked two 12-hour and two 8-hour shifts per week. Appellant's duties included repositioning patients in bed with a draw sheet with assistance from another staff member and transporting patients. Her injuries included an old ankle sprain in 1970 and a right ankle fracture in 2000. Appellant also suffered from arthritis in her neck. Her activities outside of work include walking two laps around the track near her home, collecting movies, reading novels and traveling out of town to visit relatives.

In a March 30, 2010 letter, the Office requested additional information from the employing establishment. It asked for a list of tasks the employee performed which required physical exertion and the frequency and duration of these activities, the precautions taken to minimize effects of the activities, and any disagreements it had regarding the accuracy of appellant's statements.

In a letter dated April 9, 2010, the employing establishment responded to the Office's request for additional information. It disagreed with appellant's allegations because she did not report her injury until approximately five months after she was diagnosed, and she failed to submit medical evidence demonstrating a causal relationship between her claimed condition and her work activities.

By decision dated May 17, 2010, the Office denied appellant's claim on the grounds of insufficient medical evidence establishing that her claimed medical condition was causally related to her federal employment. It accepted that her work factors occurred as alleged, but found that the medical evidence submitted failed to contain a well-rationalized medical opinion explaining how appellant's rotator cuff tear was causally related to her employment activities.

On May 27, 2010 appellant requested reconsideration. She explained that she was unable to obtain a narrative medical report from her physician's office before the decision because that type of report took additional time. Appellant stated that she would submit the report as soon as it was available.

In a decision dated June 10, 2010, the Office denied appellant's request for reconsideration because she failed to submit any new and relevant evidence supporting that she sustained a work-related condition causally related to her job duties nor advance a new legal argument. Thus, appellant was not entitled to further review of the merits.²

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act³ has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative and substantial evidence.⁴ In a claim for occupational disease, that burden of proof includes: (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.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁶ 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 specified employment factors or incident.⁷ 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.⁸

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that an employee's condition surfaced during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal

² The record also inappropriately contains medical records for another patient.

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *Ernest St. Pierre*, 51 ECAB 623 (2000); *D.U.*, Docket No. 10-144 (issued July 27, 2010).

⁶ *D.I.*, 59 ECAB 158 (2007); *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009).

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-860 (issued November 2, 2009).

relationship.⁹ The mere fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of an employment relation. Such a relationship must be shown by rationalized medical evidence of a causal relation based upon a specific and accurate history of employment conditions which are alleged to have caused or exacerbated a disabling condition.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted that appellant's employment duties required lifting and repositioning patients in bed, but denied the claim on the grounds of insufficient evidence demonstrating that her shoulder condition was causally related to the accepted employment factors. The Board affirms the Office's denial and finds that appellant did not meet her burden of proof to establish her claim.

Dr. Scott provided a detailed review of appellant's medical and social background, examination findings, and diagnosis of a rotator cuff tear in her right shoulder. He noted her complaints of shoulder pain, particularly when working and getting dressed, and her recovery from her shoulder surgery. None of Dr. Scott's reports, however, contain an explanation of whether appellant's shoulder condition resulted from her accepted employment factors. He did not discuss any of appellant's employment activities or describe how her work duties of lifting and repositioning patients caused or contributed to her rotator cuff tear. Rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition with stated reasons from a physician.¹¹ As these reports do not contain a rationalized medical opinion addressing the cause of her shoulder condition, they are of diminished probative value.¹²

Dr. Minter also examined appellant and diagnosed her with significant AC/DJD and a large rotator cuff tear. He performed a rotator cuff repair and reported that she could return to full-duty status with restrictions on April 14, 2010. While Dr. Minter provided a diagnosis of appellant's condition, he did not provide any opinion regarding the cause of her shoulder condition. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹³ Thus, these medical reports also fail to establish causal relationship.

As previously stated, causal relationship is a medical issue and must be resolved by probative medical evidence.¹⁴ Appellant was advised in the Office's March 30, 2010 letter that a comprehensive medical report explaining how her shoulder condition was caused or aggravated

⁹ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

¹⁰ *Patricia Bolleter*, 40 ECAB 373 (1988).

¹¹ *Charles W. Downey*, 54 ECAB 421 (2003); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

¹² *Daniel J. Overfield*, 42 ECAB 718 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

¹³ *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁴ *D.I.*, *supra* note 6; *Margaret Carvello*, 54 ECAB 498 (2003).

by her specific employment factors was needed to support her claim. She failed to provide such probative medical evidence. Thus, appellant has not met her burden of proof to establish that she sustained her shoulder condition in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether to review an award for or against compensation.¹⁵ The Office's regulations provide that it may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district Office.¹⁶

To require the Office to reopen a case for merit review pursuant to the Act, the claimant must provide evidence or an argument that: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁷

A request for reconsideration must also be submitted within one year of the date of the Office decision for which review is sought.¹⁸ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If the Office chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁹ If the request is timely but fails to meet at least one of the requirements for reconsideration, the Office will deny the request for reconsideration without reopening the case for review on the merits.²⁰

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's May 27, 2010 request for reconsideration because the request did not meet any of the requirements under 20 C.F.R. § 10.606(b). Appellant did not allege that the Office erroneously applied or interpreted a specific point of law. She also failed to advance a relevant legal argument or to submit relevant and pertinent evidence not previously considered by the Office.

¹⁵ 5 U.S.C. § 8128(a); *see W.C.*, 59 ECAB 372 (2008); *F.R.*, Docket No. 09-575 (issued January 4, 2010).

¹⁶ 20 C.F.R. § 10.605; *see R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁷ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

Appellant alleged that she was unable to receive a comprehensive medical report from her physician before the June 10, 2010 decision because of the rules and procedures required to get the additional medical information but had now provided the medical reports. Her claim was initially denied because she failed to submit a well-rationalized medical opinion explaining how appellant's rotator cuff tear was causally related to her employment activities. On reconsideration, she did not submit any new or relevant evidence pertaining to her claim, but only stated that she was unable to receive additional medical reports from her treating physician in a timely manner. Because appellant failed to provide new relevant evidence or advance a new legal argument as required under 20 C.F.R. § 10.606(b), the Office properly denied her request for reconsideration.²¹

CONCLUSION

The Board finds that the Office properly denied appellant's claim for occupational disease and refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).²²

²¹ *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *C.N.*, *supra* note 17.

²² The Board notes that appellant submitted additional evidence on appeal. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to the Office along with a request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 10 and May 17, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 6, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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