



## **FACTUAL HISTORY**

On February 23, 2011 appellant, then a 55-year-old pharmacy technician, filed an occupational disease claim (Form CA-2) alleging that she sustained a right shoulder rotator cuff tear from repetitively performing her technician duties. She first became aware of her injury and its relationship to her employment on January 18, 2011. Appellant notified her supervisor on January 27, 2011.

By letter dated March 10, 2011, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and asked to respond to the provided questions within 30 days.

In a February 18, 2011 narrative statement, appellant described her duties as a pharmacy technician, which included scanning prescriptions, stocking shelves, answering telephones and processing refills. She also reported that she had a previous occupational disease claim for her right shoulder in May 2004, which was accepted by OWCP.<sup>2</sup> Appellant stated that she received medical treatment and physical therapy and returned to work as a pharmacy technician. In January 2011, she experienced right shoulder pain and swelling, which prevented her from moving her shoulder. Appellant's physician informed her that she had a right rotator cuff tear.

Appellant submitted a January 27, 2011 right shoulder magnetic resonance imaging (MRI) scan report from Dr. Remy Rodriguez, Board-certified in internal medicine, who described his findings stating that there were moderate amounts of fluid deep to the right rotator cuff, high grade incomplete thickness superior surface tears of the rotator cuff and suspected subacromial spur with related impingement. Dr. Rodriguez diagnosed apparent significant right shoulder rotator cuff tears.

By decision dated May 24, 2011, OWCP denied appellant's claim. It found that, although the employment factors occurred as alleged, the medical evidence provided no firm diagnosis and did not establish causal relationship.

On June 1, 2011 OWCP received additional documents, including medical records dated February 9 to April 7, 2011, an April 26, 2011 narrative statement describing her injury and a job description for a pharmacy technician.

On August 7, 2011 appellant requested review of the written record. She noted that the delay in her request was due to her difficulty in writing with her right hand, because of her shoulder condition. By decision dated September 8, 2011, the Branch of Hearings and Review denied appellant's request for a review of the written record finding that her request was not made within 30 days of the May 24, 2011 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which establishes that she sustained an injury.

---

<sup>2</sup> The record before the Board contains no further information regarding appellant's unidentified May 2004 claim other than the information provided from her narrative statement.

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

An employee seeking benefits under FECA 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 States” within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.<sup>4</sup>

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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.<sup>5</sup>

To establish a causal relationship between the condition and any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting that causal relationship.<sup>6</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant. This medical opinion must include an accurate history of the employee’s employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician’s opinion.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant engaged in repetitive movements while working as a pharmacy technician. It denied her claim for failing to establish that the occupational exposure caused an injury. The Board finds that the medical evidence of record is insufficient to establish that appellant sustained a right shoulder rotator cuff tear causally related to factors of her employment.<sup>8</sup>

---

<sup>3</sup> Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

<sup>4</sup> Michael E. Smith, 50 ECAB 313 (1999).

<sup>5</sup> See Roy L. Humphrey, 57 ECAB 238, 241 (2005); Ruby I. Fish, 46 ECAB 276, 279 (1994).

<sup>6</sup> See 20 C.F.R. § 10.110(a); John M. Tornello, 35 ECAB 234 (1983).

<sup>7</sup> James Mack, 43 ECAB 321 (1991).

<sup>8</sup> See Robert Broome, 55 ECAB 339 (2004).

In a January 27, 2011 MRI scan report of the right shoulder, Dr. Rodriguez described his findings stating that there were moderate amounts of fluid deep to the right rotator cuff, high grade incomplete thickness superior surface tears of the rotator cuff and subacromial spur with related impingement. He diagnosed “apparent significant right shoulder rotator cuff tears.” In its May 24, 2011 decision, OWCP found insufficient evidence to establish a firm medical diagnosis of appellant’s condition, noting that an MRI scan report only provided an impression of rotator cuff tear. The Board notes that Dr. Rodriguez’ radiologic findings and his statement of diagnosis does establish a right shoulder rotator cuff tear. Given that appellant has a diagnosed condition, the question becomes whether the accepted employment factors caused her right shoulder rotator cuff tears.

While Dr. Rodriguez’ report establishes a diagnosis, it is not rationalized as to the issue of causal relation. He did not address appellant’s medical history or explain how the accepted employment factors caused or contributed to the rotator cuff tears. 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.<sup>9</sup> Thus, Dr. Rodriguez’ report is insufficient to meet appellant’s burden of proof.

Appellant also noted that she had a prior right shoulder injury from an accepted May 2004 occupational disease claim. This earlier shoulder injury makes it unclear whether her current right shoulder rotator cuff tear is a result of currently alleged occupational exposure to repetitive activities as a pharmacy technician or is an effect of the previous condition. It is appellant’s burden to specify the nature of her claim but she has never connected her present condition to any previous injury or claim. She alleges a new injury based upon cumulative trauma.

The Board notes that appellant submitted additional evidence following the May 24, 2011 merit decision. The Board, however, may not consider new evidence for the first time on appeal which was not before OWCP at the time it issued its final decision.<sup>10</sup> As the medical reports were not part of the record considered by OWCP in its May 24, 2011 decision, the Board may not consider this evidence for the first time on appeal. Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board’s merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

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

A claimant for compensation not satisfied with a decision by OWCP is entitled, on request made within 30 days after the date of the issuance of the decision, to a review of the written record on her claim before a representative of the Secretary.<sup>11</sup> According to 20 C.F.R. § 10.615, a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>12</sup> The regulations provide that a request for a hearing or review of the written record

---

<sup>9</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

<sup>10</sup> 20 C.F.R. § 501.2(c).

<sup>11</sup> 5 U.S.C. § 8124(b)(1).

<sup>12</sup> 20 C.F.R. § 10.615.

must be made within 30 days as determined by the postmark or other carrier's date marking, of the date of the decision.<sup>13</sup> A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of OWCP decision.<sup>14</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>15</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>16</sup>

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

In the present case, appellant requested review of the written record on August 7, 2011 and OWCP found that the reconsideration request was postmarked on August 9, 2011. Her request was made more than 30 days after the date of issuance of OWCP's prior decision dated May 24, 2011. Therefore, OWCP properly found in its September 8, 2011 decision that she was not entitled to an oral hearing or examination of the written record as a matter of right because her request for review of the written record was not made within 30 days of its May 24, 2011 decision.<sup>17</sup>

In the instant case, appellant did not submit a written request for review of the written record by June 23, 2011, 30 calendar days from OWCP's May 24, 2011 decision. Because her request was postmarked August 9, 2011, it is untimely. Appellant asked that her delay be excused due to difficulty writing with her right hand.

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority with respect to granting the request and it must exercise such discretion. In its September 8, 2011 decision, it properly exercised its discretion by stating that it had considered the matter and had denied her request for review of the written record because the issue of fact of injury could be addressed through a reconsideration application. The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>18</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for review of the written record.

### **CONCLUSION**

The Board finds that, while appellant established a diagnosis of right shoulder rotator cuff tear, she did not establish that this condition is causally related to factors of her federal

---

<sup>13</sup> *Id.* at § 10.616(a).

<sup>14</sup> See *James Smith*, 53 ECAB 188 (2001).

<sup>15</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>16</sup> *Id.*

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

<sup>18</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

employment. The Board further finds that OWCP properly denied her request for review of the written record as untimely.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8 and May 24, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 10, 2012  
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