



## **FACTUAL HISTORY**

On May 12, 2011 appellant, then a 59-year-old public contact representative, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left shoulder and upper back injury on May 9, 2011 when she was lifting a box on to a weighing scale. She notified her supervisor on May 13, 2011.

In a June 17, 2011 medical report, Dr. Daniel E. Heiner, a Board-certified orthopedic surgeon, reported that appellant was at work on May 9, 2011 and tried to lift a heavy box weighing approximately 20 pounds which resulted in the onset of left shoulder pain. He noted a medical history of postsurgical intervention in the left shoulder with frozen shoulder and a very prolonged postoperative course from a previous work-related injury.<sup>2</sup> Dr. Heiner stated that appellant's current injury was new and superimposed on the old injury. Appellant also complained of back and neck pain which he opined was a result of her inability to use her left shoulder. Upon physical examination and review of diagnostic testing, Dr. Heiner diagnosed rotator cuff tendinitis, biceps tendinitis of the left shoulder and injury at work with possible exacerbation of a previous preexisting work-related injury.

By letter dated August 25, 2011, OWCP requested additional factual and medical evidence from appellant and asked that she respond to the provided questions within 30 days.

In reports dated May 12 to August 26, 2011, Stephanie Herrick, a certified nurse practitioner, documented appellant's treatment for left shoulder sprain.

In an August 3, 2011 report, Dr. A. Nick Awad, a Board-certified diagnostic radiologist, reported that a magnetic resonance imaging scan of the left shoulder revealed mild arthritic changes in the left acromioclavicular joint, a grade 2 tendinitis with possible small partial intrasubstance tear of the supraspinatus tendon and tenosynovitis of the long head biceps tendon with associated fluid collection in the bicipital groove. He reported that there was no evidence of a complete rotator cuff tear or muscular retraction.

In an August 31, 2011 statement, appellant reported that she was working in the mailroom on May 9, 2011 when she lifted a 20-pound box off of the floor to place on the weight scale. She then moved the box to the front counter for pick up. Appellant experienced pain in her neck, shoulder and back later that day as a result of picking up the box that was too heavy for her. She notified her employer on that same date.

By decision dated November 15, 2011, OWCP denied appellant's claim finding that the evidence of record failed to establish that her left shoulder injury was causally related to the accepted May 9, 2011 employment incident.

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<sup>2</sup> The Board notes that appellant had a previous March 27, 2007 employment-related injury which OWCP accepted for sprain of left shoulder and upper arm, claim File No. xxxxxx427. No other information regarding appellant's prior claim is available as the claim is not explained or developed in the record before the Board in this appeal. Further, she does not allege that a recurrence of injury connected with any other claim occurred on May 9, 2011.

On January 8, 2012 appellant requested reconsideration of OWCP's decision.

Appellant submitted the November 17 and December 23, 2011 medical reports of Stephanie Herrick, a nurse, who stated that appellant had a previous left shoulder injury and surgery in 2007. For the prior four years, she did not have any incidents, complaints or claims regarding her left shoulder until she sought treatment on May 12, 2011. Ms. Herrick noted a history that appellant lifted a heavy box at work on May 9, 2011 and injured herself.

By decision dated February 3, 2012, OWCP affirmed the May 19, 2011 decision, finding that the medical evidence of record failed to establish that appellant's left shoulder injury was causally related to the May 9, 2011 employment incident.

By letter dated February 9, 2012 appellant, through her attorney, requested reconsideration of OWCP's decision. She resubmitted medical reports already of record, as well as a new medical report and a January 31, 2012 report from Dr. Theron C. Tilgner, an osteopath, who reported that appellant was being treated in a follow-up of her left shoulder. Dr. Tilgner recommended an isolated open distal clavicle resection due to appellant's complaints of continued shoulder pain.

By decision dated March 12, 2012, OWCP denied appellant's request for reconsideration finding that she did not raise a substantive legal questions or provide new and relevant evidence.

### **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 are causally related to the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.<sup>4</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>5</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized

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<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> Elaine Pendleton, 40 ECAB 1143 (1989).

medical opinion evidence based on a complete factual and medical background, supporting such a 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 the May 9, 2011 employment incident occurred as alleged. The issue is whether appellant established that the incident caused a left shoulder and back injury. The Board finds that she did not submit sufficient medical evidence to support that she sustained injury causally related to the May 9, 2011 employment incident.<sup>8</sup>

In a June 17, 2011 medical report, Dr. Heiner reported that appellant was at work on May 9, 2011 and tried to lift a heavy box weighing approximately 20 pounds which resulted in the onset of left shoulder pain. He noted a history of postsurgical intervention in the left shoulder with frozen shoulder and a very prolonged postoperative course from a previous work-related injury. Dr. Heiner stated that appellant's current injury was new and superimposed on an old injury. He diagnosed rotator cuff tendinitis, biceps tendinitis of the left shoulder and injury at work with possible exacerbation of a previous preexisting work-related injury.

The Board finds that the opinion of Dr. Heiner is not well rationalized. While Dr. Heiner's report noted a diagnosis of rotator cuff tendinitis and biceps tendinitis of the left shoulder, he failed to provide sufficient medical explanation as to how the accepted May 9, 2011 employment incident caused or contributed to the diagnosed conditions. In his report, he noted only that appellant experienced the onset of shoulder pain after lifting a heavy box at work on May 9, 2011. Dr. Heiner recounted the incident as described by appellant but failed to explain how lifting the box was competent to cause rotator cuff tendinitis or biceps tendinitis. His statement that she suffered an injury at work with possible exacerbation of a prior preexisting work-related injury is equivocal in nature and of limited probative value.<sup>9</sup>

Dr. Heiner also failed to provide an adequate and detailed medical history. Though he mentioned that appellant had a history of postsurgical intervention in the left shoulder with frozen shoulder and a very prolonged postoperative course from a previous work-related injury, he did not provide any details regarding her prior left shoulder injury. Dr. Heiner did not state the cause of her previous work-related injury or provide sufficient explanation to how the

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<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).

<sup>9</sup> *S.W.*, Docket 08-2538 (issued May 21, 2009).

accepted incident aggravated the prior injury. It is unclear if appellant's current left shoulder injury is a result of a preexisting condition or was caused or aggravated by the May 9, 2011 employment incident.

Appellant alleged that her shoulder condition is from a new injury. Dr. Heiner's broad statement that she suffered a new injury at work fails to provide adequate support or explanation for how the incident accepted in this case caused or contributed to her left shoulder injury. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet an employee's burden of proof.<sup>10</sup> The opinion of a physician supporting causal relationship must rest on a complete factual and medical background supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the relationship between the diagnosed condition and the established incident or factor of employment.<sup>11</sup> Without medical reasoning explaining how May 9, 2011 employment incident caused or contributed to her rotator cuff tendinitis and biceps tendinitis of the left shoulder, Dr. Heiner's report is insufficient to meet appellant's burden of proof.<sup>12</sup>

In an August 3, 2011 diagnostic report, Dr. Awad reported that a magnetic resonance imaging scan of the left shoulder revealed mild arthritic changes in the left acromioclavicular joint, a grade 2 tendinitis with possible small partial intrasubstance tear of the supraspinatus tendon and tenosynovitis of the long head biceps tendon. While Dr. Awad provided a diagnosis of appellant's left shoulder injury, he did not explain whether or how the accepted May 9, 2011 employment incident caused or contributed to the 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.<sup>13</sup> Thus, Dr. Awad's report is insufficient to meet appellant's burden of proof.

The remaining medical evidence of record is insufficient to establish causal relationship between appellant's left shoulder condition and the May 9, 2011 employment incident. The reports dated May 12 to December 23, 2011 from Ms. Herrick do not constitute competent medical evidence in support of a claim. A registered nurse, licensed practical nurse or physicians assistants are not physicians as defined under FECA.<sup>14</sup> Thus, their opinions are of no probative value.

In the instant case, the record lacks rationalized medical evidence establishing a causal relationship between the May 9, 2011 employment incident and appellant's left shoulder injury.

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<sup>10</sup> *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

<sup>11</sup> *See Lee R. Haywood*, 48 ECAB 145 (1996).

<sup>12</sup> *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

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

<sup>14</sup> 5 U.S.C. § 8102(2) of FECA provides as follows: (2) 'physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988).

The Board also notes that, while she also alleged that she sustained a back injury as a result of the accepted incident, she had not submitted any medical evidence to substantiate a back injury. Thus, appellant has failed to meet her burden of proof.

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

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>15</sup> Section 10.608(b) of OWCP 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), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>16</sup>

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

The Board finds that the refusal of OWCP 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 because she failed to show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent evidence not previously considered.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In the February 9, 2012 application for reconsideration, counsel did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Counsel's argument was that appellant's injury was employment related. The underlying issue in this case was whether appellant's injury was causally related to the accepted May 9, 2011 employment incident. That is a medical issue which must be addressed by relevant medical evidence.<sup>17</sup>

While appellant submitted a new medical report from Dr. Tilgner dated January 31, 2012, it is not relevant the underlying issue of causal relationship between her diagnosed condition of rotator cuff tendinitis and biceps tendinitis of the left shoulder and the May 9, 2011 employment incident. Dr. Tilgner's report merely stated that she returned for a follow-up visit due to pain and recommended she undergo surgery. This medical report is of no probative value to the issue in this case because Dr. Tilgner did not provide any opinion on the cause of appellant's shoulder injury. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>18</sup> While appellant submitted new

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<sup>15</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>16</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>17</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>18</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

evidence, it was not relevant in addressing causal relationship. In support of her request for reconsideration, she also resubmitted medical reports previously of record. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.<sup>19</sup> Claimant may obtain a merit review of OWCP's decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing causal relationship.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained a left shoulder injury on May 9, 2011 in the performance of duty, as alleged. OWCP properly denied her request for reconsideration without a merit review.

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<sup>19</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decisions dated March 12 and February 3, 2012 and November 15, 2011 are affirmed.

Issued: October 12, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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