

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

T.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grand Rapids, MI, Employer**

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**Docket No. 13-437
Issued: April 19, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 19, 2012 appellant filed a timely appeal from a July 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his occupational disease claim and an October 23, 2012 decision which denied his request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 his burden of proof to establish that he developed a right shoulder condition causally related to factors of his employment; and (2) whether OWCP properly denied appellant's September 3, 2012 claim for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 17, 2012 appellant, then a 65-year-old mail carrier, filed an occupational disease claim alleging that he developed a right shoulder strain as a result of reaching, pulling and handling mail in high mailboxes at work. He first became aware of his condition and realized that it resulted from his employment on February 28, 2012. Appellant first reported the alleged injury to the employing establishment on April 17, 2012.²

By letter dated May 9, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional evidence. It requested that he submit a detailed description of the employment activities that he believed caused his condition and respond to specific questions. OWCP also requested that appellant submit a comprehensive medical report, including a diagnosis, results of examinations and tests and a physician's opinion with medical rationale explaining the cause of his condition.

On June 1, 2012 appellant responded to specific questions from OWCP. He stated that he had complained to his supervisor about the heightened mailboxes and wrote notes to his customers requesting them to lower their mailboxes. Appellant explained that his supervisor told the customers to install their mailboxes higher than average because the substitute carrier requested higher mailboxes. He noted that he had taken a sick day every two weeks to allow his shoulder to rest but it became a point of contention with his supervisor. Appellant reported that none of his outside activities were repetitive in nature and could have caused damage to his right shoulder. He explained that he had previous left arm surgery and underwent rehabilitation. The rehabilitation resolved both arms and shoulders, which lasted two years, before his right arm began to hurt.

In an April 16, 2012 report, Dr. Gilbert A. Noirot, a Board-certified orthopedic surgeon, related appellant's complaints of right shoulder pain, which caused inability to sleep and worsened when he raised his arm above shoulder level. He reviewed appellant's history and his examination revealed a popping and clicking sound in appellant's right shoulder but no numbness or tingling in the arm, hand or fingers. Dr. Noirot observed pain, stiffness and tenderness on palpation. Speed's test was positive and pain was elicited during Neer impingement and Hawkins-Kennedy tests. Dr. Noirot diagnosed right subacromial bursitis, right shoulder impingement and right bicipital tendinitis. He explained that the injury occurred over the years while working for the employing establishment.

In an April 17, 2012 clinical note, Dr. Noirot noted that x-rays of appellant's right shoulder revealed no fractures, subluxations, arthrosis or dislocation. He diagnosed right shoulder impingement, right bicipital tendinitis and subacromial bursitis on the right. Dr. Noirot stated that appellant had a history consistent with rotator cuff pathology and referred him to physical therapy.

In a May 11, 2012 report, Dr. Anthony Pucci, a Board-certified surgeon, examined appellant for complaints of right shoulder pain, decreased mobility and internal derangement.

² The record reveals that appellant filed a previous traumatic injury claim (File No. xxxxxx388) and two occupational disease claims (File Nos. xxxxxx006 & xxxxxx789).

He noted that a magnetic resonance imaging (MRI) scan revealed degenerative hypertrophy of the acromioclavicular joint with some narrowing of the subacromial interspace and partial tear of the tendon. Dr. Pucci diagnosed partial tear associated with distal supraspinatus tendon and degenerative hypertrophy of the acromioclavicular joint. He performed a right shoulder arthrogram injection.

In May 16 and 21, 2012 reports, Dr. Noirot reexamined appellant for his right shoulder and complaints of pain and weakness. Upon examination, he observed tenderness on palpation and pain on motion. Neer impingement and Hawkins-Kennedy impingement test also produced pain. Dr. Noirot noted that an MRI scan of appellant's right shoulder revealed a partial tear and tendinopathy associated with the distal supraspinatus tendon and degenerative hypertrophy of the neuromicroclavicular joint. Dr. Noirot diagnosed right shoulder impingement, partial tear of the right rotator cuff tendon, right bicipital tendinitis and right subacromial bursitis.

In a decision dated July 27, 2012, OWCP denied appellant's claim. It accepted that his duties as a letter carrier required repetitive use of the right shoulder and that appellant was diagnosed with a right shoulder condition but denied his claim finding insufficient medical evidence to establish that his right shoulder condition was causally related to his employment.

On September 3, 2012 appellant requested reconsideration. No additional evidence was received.

By decision dated October 23, 2012, OWCP denied appellant's request for reconsideration finding that no evidence was submitted sufficient to warrant further merit review under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence³ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁴ In an occupational disease claim, appellant's burden requires submission of 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 identified by the employee.⁵

³ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁴ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁶ 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.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that his right shoulder condition resulted from his duties as a mail carrier. OWCP accepted that his duties included repetitive use of his right arm in order to reach, pull, and handle mail in high mailboxes and that he was diagnosed with a right shoulder condition. It denied appellant's claim finding insufficient medical evidence to establish that his right shoulder condition was causally related to his employment. The Board finds that he failed to provide sufficient medical evidence to establish that he developed a right shoulder condition as a result of his employment duties.

Appellant submitted various reports by Dr. Noirot, who noted appellant's complaints of right shoulder pain and reviewed his history. He noted that an x-ray revealed no fractures, subluxations, arthrosis or dislocation. Upon examination, Dr. Noirot observed pain, stiffness, and tenderness on palpation. Pain was elicited on Neer impingement and Hawkins-Kennedy impingement tests. Dr. Noirot diagnosed right subacromial bursitis, right shoulder impingement and right bicipital tendinitis. In an April 16, 2012 report, he opined that the injury occurred over the years while working for the employing establishment. Although Dr. Noirot provides an opinion on causal relationship, the Board finds that his opinion is not well rationalized. He fails to describe appellant's specific employment duties or adequately explain how those specific duties caused or contributed to appellant's diagnosed condition. The Board has found that medical evidence that states a conclusion but does not offer any rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁸ Rationalized medical opinion evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician.⁹ Without any medical rationale explaining the causal relationship between appellant's right shoulder condition and his specific employment duties, Dr. Noirot's opinion on causal relationship is of limited probative value and is insufficient to establish appellant's claim.

Appellant also submitted a report by Dr. Pucci who examined appellant for right shoulder pain and decreased mobility. He diagnosed partial tear associated with distal supraspinatus tendon and degenerative hypertrophy of the acromioclavicular joint based on an MRI scan. Although Dr. Pucci provides a diagnosis for appellant's right shoulder condition he does not provide any opinion on the cause of his condition. The Board has found that medical evidence

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

⁷ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

⁸ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

⁹ *L.F.*, Docket No. 10-2287 (issued July 6, 2011); *Solomon Polen*, 51 ECAB 341 (2000).

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.¹⁰ Therefore, this report is also insufficient to establish appellant's claim.

On appeal, appellant alleges that the attached report stated that his right shoulder injury was due to his work requirements. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final merit decision.¹¹ Since this evidence was submitted after the July 27, 2012 denial decision, the Board may not consider this evidence for the first time on appeal.¹²

Appellant may submit this or any new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹³ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district OWCP.¹⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁵

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.¹⁶ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant

¹⁰ *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

¹¹ *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹² The Board notes that, although the attached report is dated May 21, 2012 and is similar to Dr. Noirot's May 21, 2012 report, it contains new findings and an opinion that was not included in the original report on the record.

¹³ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

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

¹⁵ 20 C.F.R. § 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).

¹⁶ 20 C.F.R. § 10.607(a).

reconsideration, it reopens and reviews the case on its merits.¹⁷ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by OWCP; and he has not submitted relevant and pertinent new evidence not previously considered by OWCP.

By decision dated July 27, 2012, OWCP denied appellant's claim finding insufficient medical evidence to establish that his diagnosed right shoulder condition was causally related to factors of his employment. On September 3, 2012 appellant submitted a request for reconsideration. No additional evidence was received. Appellant did not submit any evidence sufficient to require OWCP to reopen his claim for consideration on the merits. He did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Because appellant did not meet any of the necessary requirements, the Board finds that his claim is not entitled to further merit review. Therefore, OWCP properly refused to reopen his case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a right shoulder condition causally related to factors of his employment. The Board also finds that OWCP properly denied his September 3, 2012 request for reconsideration under 5 U.S.C. § 8128(a).

¹⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁸ 20 C.F.R. § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ORDER

IT IS HEREBY ORDERED THAT the October 23 and July 27, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 19, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board