

FACTUAL HISTORY

On November 30, 2012 appellant, then a 58-year-old physician's assistant, filed an occupational disease claim alleging that he sustained severe cervical muscle pain and myofascitis as a result of sitting and using the computer in a nonergonomic workstation. He explained that beginning in 2004 he noticed pain within minutes of each workday that intensified during the workday but improved on days off. Appellant first became aware of his condition and realized it resulted from his employment on March 8, 2004. He did not stop work.

In a November 1, 2012 report, Dr. Son D. Le, Board-certified in physical medicine and rehabilitation, noted that he treated appellant for neck and back pain. He recommended that appellant have a dedicated workstation that was ergonomically designed to protect the neck and arm from further damage and strain during the workday. Dr. Le advised that appellant not be allowed to move from workstation to workstation throughout the day. He reported that this could cause further damage and strain on his spinous process, trapezius muscle and shoulder.

In a November 16, 2010 incident report, the employing establishment noted appellant's complaints of neck and bilateral wrist injuries as a result of repetitive motion at work. It related that he used a desk, chair, keyboard, mouse and computer workstation to record medication information on a regular basis.

In a November 19, 2012 report, Dr. George L. Holmes, a Board-certified family practitioner, noted that he examined appellant on October 18, 2012 for cervical, neck and muscle strains and stress due to working at a different workstation. He recommended that appellant remain at one workstation that was ergonomically suited for his back and neck.

By letter dated December 18, 2012, OWCP advised appellant that the evidence submitted was insufficient to establish his occupational disease claim and requested additional evidence.

In an undated statement, appellant noted that repetitive strain injuries were caused by a lifestyle without ergonomic care. He related that in March 2004 his neck pain had become very severe and he worked with Wayne Goodman, an industrial hygienist and Bill Wilson at his employing establishment to modify his workstation. Appellant stated that with medical treatment and an ergonomic workstation his condition stabilized and became manageable. He reported that in October 2012 he was moved and set up in a new office space. Although appellant informed his chain of command that he would need his ergonomic equipment set up in the new office space they were not able to provide this equipment. He stated that the new office space was very poorly designed and had no ergonomic fixtures. Appellant continued to perform his job duties of seeing patients and using the computer everyday with few breaks and in a high stress environment. He noted that the pain in his neck and shoulders returned and became exacerbated.

Appellant submitted various e-mails detailing the office supplies he requested for an ergonomic workstation and the office room he requested. He also submitted handwritten progress notes dated from December 16, 2004 to January 30, 2012 by employee health regarding treatment for neck and shoulder pain.

In a December 17, 2012 memorandum, the employing establishment questioned the timeliness of the filing of appellant's occupational disease claim since he noted a date of illness as March 8, 2004 but did not file until November 30, 2012.

In a January 3, 2013 letter, appellant responded to OWCP's development letter. He stated that his myofascial disorder and chronic over-use syndrome resulted from continued chronic use of keyboard usually eight hours a day in a nonergonomic workstation. Appellant reported that he typed at least 100 telecare notes, questions, prescriptions and various other patient-oriented problems daily. He related that the original 2004 date was when it was documented that his condition was work related but he was not made aware that there was a deadline to file a claim. In October 2010, appellant sought outside treatment as his neck and shoulder pain worsened. His condition stabilized after he obtained an ergonomic workstation and underwent regular medical treatment. Appellant reported that the injury recurred when he was moved into new office space without ergonomic equipment. He stated that he informed his chain of command about the need for ergonomic workstation but excuses were made that they could not modify his workstation. Appellant reported that nothing was changed so he chose to initiate OWCP's claim for the injury he suffered at work. He further alleged that his occupational disease claim was timely submitted within the three-year date of October 2010, the date of his reinjury.

In a January 10, 2013 report, Dr. Le listed appellant's diagnoses as cervicalgia, cervical strain, shoulder pain and strain, fracture of the right clavicle, unspecified disorders of the shoulder bursae and tendons and elbow osteoarthritis. He stated that in October 2010 appellant was referred to his clinic for cervical pain. Dr. Le reported that a November 8, 2010 magnetic resonance imaging (MRI) scan report was negative for any significant degenerative arthritis and that a cervical ultrasound found scar tissue where appellant described the area of pain. He explained that appellant's condition may be a result of his workstation not being modified to provide a sound ergonomic platform and repetitive stress trauma. Dr. Le stated that appellant was making progress with physical therapy and trigger point injections until October 2012 when he reported losing his ergonomically designed workstation.

In a January 15, 2013 statement, Norman C. Hardman, appellant's supervisor, stated that he was not aware of appellant's neck pain until 2012 and he believed that it was related to appellant's preexisting medical conditions, his exercise program and accidents not related to work. He noted that appellant's requests for ergonomic evaluation had been addressed until late 2012 and early 2013 when construction caused primary care to move to a new area with temporary furniture. Mr. Hardman reported that appellant's job did not differ from the official description.

In a January 31, 2013 statement, Dorla Matthews of the employing establishment disputed the timely filing of appellant's case. She noted that he completed his occupational disease claim on November 30, 2012 but he first became aware of his condition on March 8, 2004. Ms. Matthews also contended that appellant did not describe the specific issues of the workstation that he believed contributed to his conditions and had not provided a full and complete history of his condition before any of his visits to the employee health unit.

In a March 1, 2013 decision, OWCP denied appellant's claim. It accepted that he performed the duties of a physician's assistant and was diagnosed with cervical and shoulder conditions but denied his claim finding insufficient medical evidence to establish that his diagnosed conditions were causally related to factors of his employment.

On May 9, 2013 appellant submitted a request for reconsideration. He contended that he submitted direct medical evidence that related his neck injury to continued muscular skeletal strain from a poorly configured workstation and repeated biomechanical work stress on a daily basis. Appellant alleged that he provided overwhelming medical evidence that he suffered cumulative injury to his neck and shoulder and had made multiple attempts to remedy his most recent biomechanically deficient workstation.

In an April 2, 2013 report, Dr. Le noted that he was currently treating appellant for chronic neck and back pain. He recommended that appellant have a dedicated workstation that was ergonomically designed to protect the neck and arm from further damage and strain during the workday. Dr. Le stated that appellant should not move from workstation to workstation throughout the day as this would cause further damage and strain on his spinous process, trapezius muscle and shoulder. He noted that appellant averaged computerized documents of at least 300 per day due to daily patient primary care load, prescriptions, telephone calls and consults.

By decision dated May 14, 2013, 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

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination of the merits of the claim.³ Section 8122(a) of FECA provides that in cases of injury on or after September 7, 1974 a claimant has three years to file a claim for compensation.⁴ In a case of occupational disease, the time for filing a claim begins to run when the employee first becomes aware or reasonably should have been aware of a possible relationship between his or her condition and his employment. Where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.⁵

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 evidence⁶ including that he sustained an injury in the performance of duty and that any specific

³ *Charles Walker*, 55 ECAB 238 (2004); see *Charles W. Bishop*, 6 ECAB 571 (1954).

⁴ 5 U.S.C. § 8122(a).

⁵ See *Larry E. Young*, 52 ECAB 264 (2001); *William D. Goldsberry*, 32 ECAB 536, 540 (1981).

⁶ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁷ 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.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

As a preliminary matter, the Board will address whether appellant's occupational disease claim was timely filed. The employing establishment disputes the timeliness of his claim because he reports a date of illness of March 8, 2004 but did not file his occupational disease claim until November 30, 2012, which exceeds the three-year time limitation. As previously noted, however, in occupational disease claims where the employee continues in the same employment after he or she reasonably should have been aware that he or she has a condition which has been adversely affected by factors of federal employment, the time limitation begins to run on the date of the last exposure to the implicated factors.¹¹ The record reveals that appellant did not stop work and continues to be employed at the employing establishment even though he became aware of his condition on March 8, 2004. As appellant continues to be exposed to the factors of federal employment he alleges to adversely affect him, the Board finds that his occupational disease claim was timely filed.

Regarding the merits of his claim, appellant alleged that he sustained cervical and shoulder conditions as a result of his repetitive duties as a physician's assistant. By decision dated March 1, 2013, OWCP accepted that his duties included repetitive typing and work on the computer and that he was diagnosed with cervical and shoulder conditions but it denied his claim finding insufficient medical evidence to establish that his diagnosed conditions resulted from his employment duties. The Board finds that appellant did not meet his burden of proof to establish that his cervical and shoulder conditions were causally related to factors of his employment.

⁷ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

⁹ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

¹⁰ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹¹ *Supra* note 4.

Appellant received medical treatment from Dr. Le. In reports dated November 1, 2012 and January 10, 2013, Dr. Le noted that appellant was referred to his clinic for complaints of neck and back pain. In the January 10, 2013 report, he opined that “appellant’s condition may be a result of his workstation not being modified to provide a sound ergonomic platform and repetitive stress trauma.” The Board notes that Dr. Le provided a medical diagnosis based on examination findings and provided an opinion on causal relationship. Dr. Le’s opinion that appellant’s condition “may be a result” of factors of his employment is speculative.¹² Because an award of compensation may not be based on surmise, conjecture, speculation or upon appellant’s own belief that there is a causal connection between his claimed condition and his employment, Dr. Le’s opinion on causal relationship is insufficient to establish appellant’s occupational disease claim.¹³

Dr. Holmes’ November 19, 2012 report does not provide any opinion on the cause of appellant’s cervical and shoulder conditions. The Board has found 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.¹⁴ Both physicians attribute appellant’s conditions to working at a poorly designed workstation and both recommend that he remain at one ergonomically designed workstation throughout his workday. The Board has held, however, that 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.¹⁵

Because appellant has not submitted such medical evidence in this case, the Board finds that OWCP properly denied his occupational disease claim.

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.¹⁶ OWCP’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 or her right through a request to the district Office.¹⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) establish that OWCP erroneously applied or

¹² *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

¹³ *Robert A. Boyle*, 54 ECAB 381 (2003); *Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁴ *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

¹⁵ *Patricia J. Bolleter*, 40 ECAB 373 (1988).

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

¹⁷ 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).

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.¹⁸

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.¹⁹ 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 reconsideration, it reopens and reviews the case on its merits.²⁰ 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.²¹

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 March 1, 2013, OWCP denied appellant's claim finding that the evidence did not establish that his cervical and shoulder conditions were causally related to factors of his employment. By appeal form dated May 9, 2013, appellant requested reconsideration. He alleged that he provided overwhelming medical evidence of neck injury caused by a poorly configured workstation and related biomechanical stress.

Along with his request for reconsideration, appellant submitted an April 2, 2013 report by Dr. Le, who noted that he treated appellant for chronic neck and back pain and related that appellant's duties involved typing an average of 300 computerized documents a day. Dr. Le recommended that appellant have a dedicated workstation that was designed to protect the neck and arm and that appellant not move from workstation to workstation. The April 2, 2013 report is repetitive and similar in nature to his November 1, 2012 report. The Board has found that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²²

On appeal, appellant alleges that the letters of his physicians and history of injury were compelling enough for another review of his case. The Board finds that he failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by

¹⁸ *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).

¹⁹ *Id.* at § 10.607(a).

²⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²² *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. 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 his cervical and shoulder conditions were causally related to factors of his employment. The Board also finds that OWCP properly denied appellant's May 9, 2013 request for reconsideration under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 14 and March 1, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 22, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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