

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

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**E.J., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Detroit, MI, Employer**

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**Docket No. 14-4  
Issued: March 13, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 3, 2013 appellant filed a timely appeal from an August 1, 2013 merit decision and a September 6, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 her burden of proof to establish that she developed a right shoulder injury causally related to factors of her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 3, 2013 appellant, then a 41-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging injury to the right shoulder in the performance of duty. Her condition resulted from hand casing mail. Appellant noted a prior left shoulder surgery due to a work-related traumatic injury. She first became aware of her condition in September 2012 and first realized its relationship to her employment on March 8, 2013. Appellant did not file a notice with the employing establishment within 30 days after the date she first realized the relationship of her condition to her employment because the pain had been intermittent.

In a report dated March 28, 2013, Dr. Henry Tong, Board-certified in physical medicine and rehabilitation, noted that appellant had right shoulder pain and referred her to a specialist. He reviewed her clinical history, including a work-related injury on December 28, 2006 to her left arm and neck, for which she had physical therapy. Appellant underwent surgery for her left shoulder on July 21, 2010. Dr. Tong stated that appellant was currently hand casing mail at work, which required her to turn her neck side to side, causing pain. Appellant worked from four to eight hours per day with restrictions. On physical examination, Dr. Tong noted positive Neer's and Hawkins' signs on the right upper trapezius and scapular region. He diagnosed C3-5 disc bulges and spondylosis without stenosis; left C3 radiculopathy; a left partial thickness supraspinatus and infraspinatus tear; an anterior glenoid labral tear; and an acromioclavicular (AC) inferior spur; myofascial pain in the left upper/middle trapezius muscle, secondary to her neck and shoulder problems; and a left forearm tingling due to a left ulnar mononeuropathy at the elbow.

By letter dated April 17, 2013, OWCP requested additional factual and medical evidence. It requested an opinion from her physician addressing causal relationship. OWCP afforded appellant 30 days to submit additional evidence and noted that a physician's assistant was not a physician as defined under FECA. It also requested information regarding her duties and precautions against injury from the employing establishment.

Appellant submitted a report from a certified physician's assistant dated April 24, 2013. She also submitted an April 24, 2013 report from Dr. Daya Vora, a Board-certified radiologist. Dr. Vora obtained an x-ray and diagnosed mild reactive sclerosis of the greater tuberosity and a tiny spur formation at the tip of the acromion process.

On April 24, 2013, Dr. Robert B. Kohen, a Board-certified orthopedist, diagnosed appellant with right shoulder impingement. He recommended physical therapy for her condition three times a week for four to six weeks.

In a statement dated May 1, 2013, appellant attributed her right shoulder condition to filing paperwork and hand casing mail. While hand casing, her neck and both shoulders would start burning, and she would stop and stretch for a short period. Appellant's symptoms degraded over time, such that her right shoulder felt weak and her fingers became numb and tingled. She noted hobbies of recumbent bicycling and ballroom dancing. Appellant stated that repetitive motions made her condition worse, and that she had never had any previous right shoulder, hand, arm or wrist injuries.

In a report dated June 6, 2013, Dr. Tong restated the findings in his March 28, 2013 report. He noted that on April 24, 2013 appellant was diagnosed with right shoulder impingement and that Dr. Kohen recommended physical therapy. Dr. Tong noted that, on May 14, 2013, she underwent radiofrequency ablation, which helped her neck pain.

By decision dated August 1, 2013, OWCP denied appellant's claim. It found that she had not submitted sufficient evidence to establish that her right shoulder condition was caused or aggravated by factors of her employment.

By letter dated August 19, 2013, appellant requested reconsideration of the August 1, 2013 decision. She submitted an August 30, 2013 note explaining that she was currently seeing a new physician.

By decision dated September 6, 2013, OWCP denied appellant's request for reconsideration. It found that she had not submitted new and relevant evidence or raised any substantive legal questions about the prior decision.

### **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>2</sup> These are the essential elements of every compensation claim regardless of whether the claim is based on a traumatic injury or an occupational disease.<sup>3</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.<sup>4</sup> An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that

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<sup>2</sup> *Gary J. Watling*, 52 ECAB 278, 279 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>3</sup> *Michael E. Smith*, 50 ECAB 313, 315 (1999).

<sup>4</sup> *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 428 n.37 (2006); *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.<sup>5</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>6</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's reasoned opinion on whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. 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.<sup>7</sup> 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>8</sup>

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

Appellant filed a claim alleging a right shoulder condition due to factors of her federal employment. OWCP denied her claim, finding that she did not submit sufficient medical evidence to establish causal relation. The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a right shoulder condition due to factors of her federal employment.

Dr. Tong's March 28, 2013 report reviewed appellant's medical history and addressed a previous work-related injury to the left shoulder. He did not provide a diagnosis for her right shoulder condition other than "pain." The Board notes that pain is generally a description of a symptom and not considered a firm medical diagnosis.<sup>9</sup> Moreover, Dr. Tong did not address causal relationship. Therefore, this report is insufficient to establish appellant's claim.

On April 24, 2013 Dr. Vora diagnosed a mild reactive sclerosis of the greater tuberosity and a tiny spur formation at the tip of the acromion process. On the same date, Dr. Kohen diagnosed appellant with right shoulder impingement on an outpatient form. Dr. Tong referred to Dr. Kohen's diagnosis in a June 6, 2013 report, which was similar to his March 28, 2013 report. The Board finds that none of the physicians of record adequately addressed the issue of causal relationship. The report of Dr. Vora provided no opinion as to how the right shoulder findings related to appellant's work. Dr. Kohen's diagnosis of right shoulder impingement provided no reference to any employment factors. 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

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<sup>5</sup> *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

<sup>6</sup> *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117, 123 (2005).

<sup>7</sup> *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

<sup>8</sup> *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

<sup>9</sup> *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

value on the issue of causal relationship.<sup>10</sup> Lacking thorough medical rationale on the issue of causal relationship, the reports of Drs. Vora and Kohen are of diminished probative value and are not sufficient to establish that appellant sustained an employment-related right shoulder condition in the performance of duty.

As noted, Dr. Tong's reports addressed appellant's prior left shoulder conditions, not the claimed condition. Appellant must submit medical evidence with a rationalized opinion on the causal relationship between a diagnosed condition and the identified employment factors. To be rationalized, the opinion of a 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.<sup>11</sup> Dr. Tong generally noted that moving appellant's neck side to side caused pain. He did not provide an opinion of reasonable medical certainty regarding the cause of appellant's diagnosed right shoulder condition. The Board has held that the fact that a condition manifests itself or worsens during a period of employment<sup>12</sup> or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between a claimed condition and employment factors.<sup>13</sup> Therefore, Dr. Tong's report does not establish appellant's claim for a work-related right shoulder injury.

Appellant also submitted a report from a physician's assistant dated April 24, 2013. A physician's assistant is not a "physician" as defined under FECA. This report is not probative medical evidence supportive of a claim for federal workers' compensation, unless countersigned by a physician.<sup>14</sup> As the report was not countersigned, it does not constitute probative medical evidence.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's conditions became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.<sup>15</sup> Causal relationship must be established by rationalized medical opinion evidence and appellant did not submit such evidence.

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<sup>10</sup> See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Ellen L. Noble*, 55 ECAB 530, 534 (2004).

<sup>11</sup> *Leslie C. Moore*, *supra* note 7.

<sup>12</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>13</sup> *B.B.*, Docket No. 13-256 (issued August 13, 2013); *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

<sup>14</sup> See 5 U.S.C. § 8101(2); *Lyle E. Dayberry*, 49 ECAB 369, 372 (1998) (regarding physicians' assistants); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000) (regarding physical therapists).

<sup>15</sup> See *D.U.*, Docket No. 10-144 (issued July 27, 2010); *D.I.*, 59 ECAB 158, 162 (2007); *Robert Broome*, 55 ECAB 339, 341 (2004).

Appellant may submit 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**

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's 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>16</sup> Section 10.608(b) of OWCP's 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>17</sup>

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.<sup>18</sup> The Board also 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>19</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>20</sup>

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

OWCP denied appellant's claim for compensation by decision dated August 1, 2013. On August 19, 2013 she requested reconsideration and submitted a note dated August 30, 2013 explaining that she was currently seeing a new physician.

The Board finds that appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered. Furthermore, she did not submit relevant and pertinent new evidence not previously considered by OWCP with her request. The only evidence submitted in support of her request of reconsideration was the August 30, 2013 note regarding a change in physician. This evidence is not relevant to appellant's occupational disease claim, as the underlying issue is whether her right shoulder condition was causally related to duties of her employment. This is a medical issue that must be addressed by a physician.<sup>21</sup> Appellant's note regarding a change in physician

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<sup>16</sup> 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

<sup>17</sup> *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495, 499 (2008).

<sup>18</sup> *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

<sup>19</sup> *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

<sup>20</sup> *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

<sup>21</sup> *See Bobbie F. Cowart*, 55 ECAB 746, 749 (2004).

is not relevant to the issue of causal relationship. Accordingly, it is not relevant or pertinent to the underlying issue in her case and it is not sufficient to require OWCP to reopen her claim for consideration of the merits.<sup>22</sup>

Because appellant did not meet any of the necessary requirements for reconsideration of her case by OWCP, she is not entitled to further merit review. The Board finds, therefore, that OWCP properly refused to reopen her case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that her right shoulder condition was causally related to factors of her federal employment. The Board also finds that OWCP properly denied her request for reconsideration under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 6 and August 1, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 13, 2014  
Washington, DC

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

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

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

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<sup>22</sup> See *James W. Scott*, 55 ECAB 606, 609 (2004).