

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

C.G., Appellant)
and) Docket No. 14-1430
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 7, 2014
Ashdown, AR, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 1, 2014 appellant filed a timely appeal from a February 28, 2014 nonmerit decision and a November 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 her burden of proof to establish an injury in the performance of duty; and (2) whether OWCP properly denied her request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 29, 2013 appellant, then a 54-year-old part-time flexible sales/service associate and distribution clerk, filed a traumatic injury claim alleging a right shoulder injury in the

¹ 5 U.S.C. § 8101 *et seq.*

performance of duty on April 12, 2013. She picked up a heavy parcel from a hamper. A witness provided a statement corroborating appellant's assertions. Appellant began working a light-duty assignment.

In an April 27, 2013 statement, appellant stated that she experienced right shoulder pain as she attempted to lift a 50-pound parcel from a hamper. She stated that her coworker heard her cry out in pain and came to assist her.

In a May 23, 2013 report, Dr. Adam Smitherman, a Board-certified orthopedic surgeon, diagnosed shoulder pain. He noted that appellant felt a pop as she was picking up a heavy parcel. Dr. Smitherman advised that right shoulder x-rays revealed no fracture and a little cortical irregularity at the metaphyseal junction. He also noted that appellant was tender over the biceps tendon and cuff insertion. Dr. Smitherman advised appellant to limit her lifting to no more than 10 pounds and to refrain from throwing or any other overhead work. He reiterated appellant's work restrictions in a May 23, 2013 disability status report and advised that she could return to light duty. Appellant and her supervisor agreed to a limited-duty schedule, in a May 24, 2013 offer of modified assignment, in accordance with Dr. Smitherman's restrictions.

In a June 5, 2013 attending physician's report (CA-20), Dr. Smitherman diagnosed pain in the joint/shoulder region. He checked the box marked "yes" when asked if he believed appellant's injury resulted from her work activities.

Appellant filed claims for compensation beginning June 1, 2013. The employing establishment advised that she was working light duty part of the day and was in a leave without pay status for the remainder of the duty. The form noted that appellant received continuation of pay from April 13 through May 27, 2013.

In a June 17, 2013 letter, OWCP notified appellant that the evidence of record was insufficient to establish her claim. Appellant was advised to submit a medical report that included a diagnosis and a physician's opinion regarding causal relationship. She was advised that pain was considered a symptom and not a firm medical diagnosis.

In a July 11, 2013 report, Dr. Smitherman noted that appellant injured herself at work while lifting a heavy parcel. He diagnosed right shoulder weakness and pain. Dr. Smitherman noted that right shoulder x-rays did not reveal a fracture but there was cortical irregularity at the metaphyseal junction. He advised that he believed the work incident caused appellant's shoulder injury because she had no shoulder pain prior to the incident. Dr. Smitherman also advised that a magnetic resonance imaging (MRI) scan had been ordered.

By decision dated July 25, 2013, OWCP denied appellant's claim. It found that the medical evidence did not establish that the April 12, 2013 work incident caused injury to her right shoulder.

Appellant submitted evidence and requested reconsideration on September 16, 2013. In July 11 and 25, 2013 work status reports, Dr. Smitherman reiterated appellant's work restrictions. In a July 25, 2013 report, he noted that appellant had improved some but was still experiencing pain.

In an August 8, 2013 report, Dr. Joseph Robbins, Board-certified in diagnostic radiology, advised that a right shoulder MRI scan revealed an anterior tear and posterior tendinosis involving the distal 10 millimeters of the supraspinatus tendon at its insertion. He also noted that it was probable that appellant had tendinosis in the bicep anchor as well. Dr. Robbins noted that appellant had a shoulder injury with continued pain and decreased range of motion.

In an August 15, 2013 report, Dr. Smitherman diagnosed a right full thickness rotator cuff tear. He discussed a possible rotator repair surgery with appellant. Dr. Smitherman advised that the MRI scan showed some tendinosis or edema and a possible partial thickness tear of the biceps tendon at its insertion. He also noted that the present condition followed an acute shoulder injury that occurred three months earlier. In an August 22, 2013 report, Dr. Smitherman suggested surgical repair because the injury would not likely repair on its own. He reiterated that the injury occurred while appellant was at work and that she related to him that it occurred when she lifted a heavy box. In an August 22, 2013 disability status report, appellant advised that appellant should not work until after surgery.

By decision dated November 14, 2013, OWCP denied appellant's claim because medical evidence did not include a physician's opinion regarding causal relationship supported by adequate medical rationale.

On January 17, 2014 appellant requested reconsideration, asserting that her condition was employment related, noting that she had submitted documentation and again describing how the claimed injury occurred. OWCP also received additional medical evidence. In a November 20, 2013 report, Dr. Smitherman noted that appellant continued to have shoulder pain and reiterated that he did not think there would be any improvement without surgery. In a January 15, 2014 report, Dr. Smitherman noted that appellant continued to have shoulder pain as a result of a work injury. He stated that her pain was due to an injury at work while lifting heavy packages. Dr. Smitherman recommended surgery and advised that, since this injury was sustained at work, it will be covered under her workers' compensation claim. His July 25, 2013 report was also resubmitted.

By decision dated February 28, 2014, OWCP issued a decision denying the request for reconsideration, finding that the request was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,² including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.³ The employee must also

² *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

³ *R.C.*, 59 ECAB 427 (2008).

establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁵

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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.⁶

ANALYSIS -- ISSUE 1

On April 12, 2013 appellant lifted a parcel while at work. The evidence supports that the claimed work incident occurred. Therefore, the Board finds that the first component of fact of injury is established. However, the medical evidence is insufficient to establish that the employment incident on April 12, 2013 caused appellant's right shoulder condition.

In his August 22, 2013 report, Dr. Smitherman diagnosed right full thickness rotator cuff tear. He noted that he believed that appellant's injury occurred at work. Dr. Smitherman also advised that appellant related to him that the injury occurred as she lifted a heavy box at work. Although this report included an opinion on causal relationship he did not provide sufficient medical rationale is insufficient to discharge appellant's burden of proof. Dr. Smitherman appears to state the facts as reported to him by appellant. The Board has held that a physician's opinion regarding causal relationship that appears to be primarily based on appellant's own representations rather than on objective medical findings is of limited probative value.⁷ In his July 11, 2013 report, Dr. Smitherman also noted that appellant injured herself at work while lifting a heavy parcel. He stated that he believed the work injury caused appellant's diagnosed condition because she did not have shoulder pain prior to the incident. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.⁸ In his June 5, 2013 attending physician's report (CA-20), Dr. Smitherman diagnosed pain in the joint/shoulder region. He checked a box "yes" in

⁴ *Id.; Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *T.H.*, 59 ECAB 388 (2008).

⁶ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *C.M.*, Docket No. 14-88 (issued April 18, 2014).

⁸ *Thomas D. Petrylak*, 39 ECAB 276 (1987).

response to whether he believed appellant's injury resulted from her work activities. The Board has held that an opinion on causal relationship that consists only of a physician checking yes to a medical form question on whether the claimant's condition was related to the history given is of little probative value.⁹ Dr. Smitherman did not adequately explain the pathophysiological process by which the incident of April 12, 2013 caused appellant's right shoulder condition. The treatment records do not provide a full background of appellant's medical history. Moreover, his opinion on support of appellant's claim was stated to a reasonable degree of medical certainty. It was not addressed whether the diagnostic test supported a recent tear or if the findings were of a long-standing or degenerative nature.

Other reports from Dr. Smitherman and a diagnostic report from Dr. Robbins are also insufficient to discharge appellant's burden of proof. They do not address how lifting a parcel on April 12, 2013 caused the diagnosed shoulder condition.¹⁰

Appellant may submit new evidence or argument as part of a formal 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) of FECA, 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.¹¹ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹² When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹³

ANALYSIS -- ISSUE 2

On November 14, 2013 OWCP denied appellant's claim finding that the medical evidence did not sufficiently establish that the April 12, 2013 employment incident caused or aggravated a right shoulder condition. Appellant submitted a timely request for reconsideration. She argued that documentation has been provided and that she initially did not

⁹ *Deborah L. Beatty*, 54 ECAB 334 (2003) (the checking of a box yes in a form report, without additional explanation or rationale, is insufficient to establish causal relationship).

¹⁰ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

¹¹ 20 C.F.R. § 10.606(b)(2).

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.608(b).

understand what evidence was needed to establish her claim. Appellant also submitted new evidence.

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. Appellant submitted a January 15, 2014 report from Dr. Smitherman, which reiterated that appellant sustained an injury at work while lifting a heavy package. This report is new but it is not relevant because it contains the same information regarding causal relationship that was contained in his July 11 and August 22, 2013 reports previously submitted by appellant. Appellant also resubmitted a July 25, 2013 report from Dr. Smitherman. The submission of evidence that repeats or duplicates evidence already included in the case record does not constitute a basis for reopening a case.¹⁴ In a November 20, 2013 report, Dr. Smitherman noted that appellant continued to experience shoulder pain and advised that in his opinion her injury would not improve without surgery. This medical report is not relevant because it does not specifically address causal relationship between the April 12, 2013 work incident and her right shoulder condition.¹⁵

Furthermore, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP. While she offered her argument for why she believed her claim should be accepted, the underlying point at issue in the claim, causal relationship, is medical in nature. Because appellant failed to meet any of the three regulatory criteria for reopening a claim, she was not entitled to further merit review of her claim.

CONCLUSION

The Board finds that appellant did not establish that she sustained a traumatic injury in the performance of duty on April 12, 2013. The Board also finds that OWCP properly refused to reopen appellant's case for further review of the merits.

¹⁴ *Edward W. Malaniak*, 51 ECAB 279 (2000).

¹⁵ *D.K.*, 59 ECAB 141 (2007) (the submission of evidence that does not address the relevant issue involved does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2014 and November 14, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 7, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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