



On appeal, counsel contends that Dr. Benjamin A. Goldberg, an attending Board-certified orthopedic surgeon, provided a comprehensive narrative report providing an unequivocal opinion with the requisite medical rationale that appellant's work duties, as set forth in her October 15, 2013 statement, contributed to her right shoulder condition.

### **FACTUAL HISTORY**

This case has previously been before the Board on several occasions. In decisions dated February 28, 2007,<sup>3</sup> October 15, 2009,<sup>4</sup> and August 10, 2011,<sup>5</sup> the Board affirmed OWCP's denial of appellant's occupational disease claim for a right shoulder injury and denial of her request for reconsideration without a merit review. The Board found that she did not submit sufficient medical evidence establishing a causal relationship between the accepted employment factors and the claimed injury. The Board also found that the evidence submitted in support of appellant's request for reconsideration did not meet any of the three criteria for warranting a merit review of her claim. The relevant facts are set forth below.

On August 29, 2006 appellant, then a 50-year-old casual clerk, filed an occupational disease claim alleging that on July 20, 2005 she first became aware of her right shoulder injury. She further alleged that on April 6, 2006 she first realized that her condition was caused or aggravated by her federal employment.

Following issuance of the Board's August 10, 2011 decision, appellant, through counsel and by letter dated September 11, 2011, requested reconsideration before OWCP.

In a September 6, 2011 medical report, Dr. Goldberg found that appellant had a rotator cuff tear of the right shoulder that required surgery. He opined that the diagnosed condition was causally related to her employment.

In an October 25, 2011 decision, OWCP denied modification of its denial of appellant's claim for an occupational disease. It found that Dr. Goldberg provided no rationale explaining how the established work duties caused or aggravated the claimed right shoulder injury.

By letter dated November 30, 2011, appellant, through counsel, requested reconsideration and submitted additional medical evidence. In a November 30, 2011 report, Dr. Goldberg provided a history that she was a fairly young lady who had a rotator cuff tear. Appellant reported pushing heavy equipment and lifting heavy sacks. She recalled an event where she sustained a shoulder injury. Based upon this history and the presence of a full thickness rotator cuff tear, Dr. Goldberg opined that appellant's right shoulder condition and need for surgery were caused by an injury she sustained while working at the employing establishment. He stated that, although rotator cuff tears could be due to a degenerative process, this was less likely based on her history and young age.

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<sup>3</sup> Docket No. 07-1968 (issued December 28, 2007).

<sup>4</sup> Docket No. 09-801 (issued October 15, 2009).

<sup>5</sup> Docket No. 11-271 (issued August 10, 2011).

In an August 26, 2013 decision, OWCP denied modification of the October 25, 2011 decision. It found that Dr. Goldberg's November 30, 2011 report was not comprehensive as he did not describe appellant's symptoms, objective test results, and medical treatment provided. In addition, he did not explain how he arrived at his opinion on causal relationship.

In a December 5, 2013 letter, appellant's counsel requested reconsideration and submitted additional medical evidence. In a November 25, 2013 report, Dr. Goldberg reviewed appellant's medical records and her declaration of her work duties, a description of a mail handler position, and documents from the Office of Safety and Health Administration (OSHA) regarding heavy lifting. He reiterated his diagnosis of right rotator cuff tear, and noted that the condition was surgically repaired on April 20, 2010 and resulted in overall good relief of pain with mild weakness and stiffness. Dr. Goldberg opined that the right shoulder condition was caused, accelerated, and precipitated by appellant's work duties. He stated that repeatedly lifting more than 70 pounds was a competent etiology of her diagnoses. Dr. Goldberg further stated that appellant's description of this work activity exceeded OSHA guidelines. He reiterated his statement that a rotator cuff tear for someone of appellant's age was rarely caused by degeneration and more likely attributed to repetition and excessive tendon overload. Dr. Goldberg cited OSHA report which indicated that shorter mail handlers (such as appellant who was 5 feet 4 inches tall) were more susceptible to shoulder injuries. In a November 25, 2013 work capacity evaluation, he stated that she could not perform her usual job, but she could work eight hours a day with restrictions.

In a February 13, 2014 decision, OWCP denied modification of the August 26, 2013 decision. It found that Dr. Goldberg's November 25, 2013 report was insufficient to establish causal relationship because it was not based on an accurate account of appellant's work duties, noting that she worked as a casual clerk and not a mail handler. OWCP further found that his report was insufficient to establish her claim as the rationale he provided in support of his opinion on causal relationship was based on the lack of a correlation between her age and degenerative etiology which was found to be of diminished probative value by the Board's August 10, 2011 decision. It found that Dr. Goldberg's use of similar rationale in citing a positive correlation between short mail handlers and shoulder problems was also of limited probative value. OWCP noted that appellant's declaration, which was presumably a description of her casual clerk activities, was not contained in the record and advised that if she wished to pursue her claim, she could arrange for submission of her declaration.

By letter dated March 31, 2014, appellant's counsel requested reconsideration. In an October 15, 2013 declaration, appellant described her claimed injury and mail handler work duties. She stated that the onset of her injuries started around 2000 to 2005, with on and off pain. Appellant loaded and unloaded trays of mail, parcels, and books onto a belt and threw these items into containers and hampers. This was stressful as she used her dominant arm 8 hours a day and sometimes 12 hours a day during overtime work. Appellant experienced neck and shoulder pain while loading and unloading 70-pound sacks filled with books and heavy bundles of magazine wrappings. She pushed and lifted up to 1,100 pounds from a moving dolly that weighed 400 pounds and held 30 tubs weighing 35 pounds each. When appellant stopped keying she had to turn, twist, and aim to throw off heavy bundles of books and magazines. She did a lot of overhead throwing, stacking, and loading with cages being six feet tall and she being five feet four inches tall.

Hospital records included Dr. Goldberg's April 20, 2010 report which described appellant's right shoulder surgery performed on that date.

In a July 1, 2014 decision, OWCP denied modification of the February 13, 2014 decision. It again found that Dr. Goldberg's opinion on causal relationship was not based on an accurate account of appellant's work duties. OWCP further found that her statement of her work duties was not based on a factual history of her casual clerk work duties. It noted that the employing establishment had not commented on appellant's work duties.

In an August 28, 2014 letter, appellant's counsel requested reconsideration. He contended that the accompanying witness statements supported appellant's declaration of her casual clerk duties. In narrative statements dated August 14 and 20, 2014, appellant's coworkers, Marjorie Hamlin and Denee Sipp, respectively, described appellant's repetitive work duties as a casual clerk and mail handler. An employing establishment document, which stated that it was not an official job description, provided a general summary of the duties of a mail handler that was designed to assist treating physicians in their recommendations for appropriate work restrictions.

In a September 29, 2014 decision, OWCP denied reconsideration of the merits of appellant's claim. It found that the evidence submitted was not relevant to the medical issue of whether she sustained a medical condition causally related to the accepted employment factors.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>6</sup> OWCP regulations provide that 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>7</sup> 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.<sup>8</sup> Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>9</sup>

### **ANALYSIS**

On August 28, 2014 appellant disagreed with OWCP's July 1, 2014 decision, denying her claim for an occupational disease. She requested reconsideration. The underlying issue on reconsideration is medical in nature.

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<sup>6</sup> *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.607(a).

<sup>9</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, she did not advance a relevant legal argument not previously considered.

The Board also finds that appellant did not submit relevant or pertinent new evidence not previously considered. Appellant submitted statements from Ms. Hamlin and Ms. Sipp, and an employing establishment document which described appellant's casual clerk and mail handler duties. The factual existence of appellant's work-related duties is not in dispute as these work factors have been accepted. The claim was denied due to insufficient medical evidence on causal relationship; medical evidence addressing how the accepted employment factors caused or aggravated a diagnosed medical condition.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel contended that Dr. Goldberg provided a comprehensive narrative report providing an unequivocal opinion with the requisite medical rationale that appellant's work duties, as set forth in her October 15, 2013 statement, contributed to her right shoulder condition. However, the Board lacks jurisdiction to reach a substantive evaluation of this medical evidence. The issue on appeal is whether appellant submitted sufficient evidence to warrant reopening of her claim for a merit review under 20 C.F.R. § 10.606(b)(3). A merit review would include the evaluation of Dr. Goldberg's report. Because appellant failed to meet any of the three regulatory criteria which are the threshold for reopening a claim, she was not entitled to further merit review of her claim.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2015  
Washington, DC

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

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

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