

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

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D.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Milwaukee, WI, Employer )

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**Docket No. 15-1400  
Issued: November 3, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 11, 2015 appellant filed a timely appeal from a February 26, 2015 merit decision and a May 7, 2015 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 has established a right upper extremity injury on November 28, 2006 in the performance of duty; and (2) whether OWCP properly denied reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On December 1, 2006 appellant, then a 48-year-old custodian, filed a traumatic injury claim (Form CA-1) claiming that on November 28, 2006 he injured his right shoulder and triceps

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

tendon when lifting a bucket of water. He stopped work on December 1, 2006 and returned to modified work on December 3, 2006.

In a June 21, 2007 report, Dr. John Hayes, an attending Board-certified internist, diagnosed a right rotator cuff tear and anterior-inferior glenoid labrum tear due to the November 28, 2006 lifting incident. He recommended arthroscopic repair. Appellant remained on modified duty through December 2008.

On October 23, 2014 appellant claimed a recurrence of disability commencing July 17, 2014. He stated that the original injury had not resolved. In support of his claim, appellant submitted an October 23, 2014 report from Dr. Demetrios J. Douros, an attending Board-certified orthopedic surgeon. Dr. Douros related appellant's account of lifting a bucket at work in November 2006, which caused a pop in his right shoulder, and the immediate onset of pain. He diagnosed a right rotator cuff tear which "occurred at work in November 2006 while working as a custodian." As conservative measures had not relieved appellant's symptoms, Dr. Douros recommended arthroscopic repair.

In an October 31, 2014 letter, OWCP noted that it had not formally adjudicated appellant's traumatic injury claim as it had appeared to be a minor injury with little or no lost time from work. It advised him of the additional evidence needed to establish his claim, including a report from his attending physician explaining how and why the November 28, 2006 incident would cause the claimed right rotator cuff tear. OWCP requested that appellant describe any treatment provided since the original injury.

In response, appellant submitted medical records.<sup>2</sup> On December 1, 2006 Dr. Kimberly A. Ridl, an attending general surgeon, diagnosed a right rotator cuff strain sustained after appellant lifted a pail three days before. She obtained x-rays showing acromioclavicular degeneration.<sup>3</sup> Imaging studies reviewed on April 2, 2007 showed a complex tear of the right supraspinatus tendon, progressive degenerative disease in the right shoulder, an increasing full-thickness rotator cuff tear, and muscular atrophy in the rotator cuff.

On May 13, 2014 Dr. Anthony LoGuidice a resident physician, noted appellant's complaints of increasing bilateral shoulder pain over a period of years. A May 27, 2014 magnetic resonance imaging (MRI) scan showed a complete right biceps tendon tear.

By decision dated February 26, 2015, OWCP denied appellant's claim for traumatic injury, finding that causal relationship was not established. It accepted that the November 28, 2006 lifting incident occurred at the time, place, and in the manner alleged. OWCP found, however, that the medical evidence did not contain adequate rationale explaining how and why the accepted incident would cause the claimed right rotator cuff tear.

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<sup>2</sup> Appellant also submitted extensive records relating to a December 2012 left knee arthroplasty. These documents do not address the claimed right shoulder injury.

<sup>3</sup> Appellant participated in physical therapy intermittently from February 2006 to April 2007.

In an April 4, 2015 appeal request form, received by OWCP on April 15, 2015, appellant checked a box indicating his request for reconsideration. He did not submit additional evidence or argument.

By decision dated May 7, 2015, OWCP denied reconsideration as appellant did not submit new, relevant evidence or argument in support of his request.

### **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 and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>4</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>5</sup>

In order to determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, fact of injury consists of two components that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.<sup>6</sup> An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>7</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>8</sup>

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated 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>9</sup>

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<sup>4</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>6</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>7</sup> *S.N.*, Docket No. 12-1222 (issued August 23, 2013); *Tia L. Love*, 40 ECAB 586, 590 (1989).

<sup>8</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

<sup>9</sup> *Solomon Polen*, 51 ECAB 341 (2000).

## **ANALYSIS -- ISSUE 1**

Appellant claimed that he sustained a right shoulder injury on November 28, 2006 when he lifted a bucket of water. OWCP accepted that the November 28, 2006 incident occurred as alleged, but denied the claim as the medical evidence did not establish a causal relationship between those factors and the claimed left shoulder injury.

Three of appellant's physicians mentioned the accepted lifting incident. Dr. Ridl, a general surgeon, diagnosed a right rotator cuff strain after appellant lifted a pail on November 28, 2006. Dr. Hayes, an attending Board-certified internist, diagnosed right rotator cuff tear and anterior-inferior glenoid labrum tear due to the November 28, 2006 lifting incident. Dr. Douros, an attending Board-certified orthopedic surgeon, diagnosed a right rotator cuff tear which "occurred at work in November 2006 while working as a custodian." Although the physicians opined that the accepted lifting incident caused a right rotator cuff tear, they did not provide their medical reasoning in support of this conclusion. Without such rationale, the opinions of Drs. Ridl, Hayes, and Douros are insufficient to meet appellant's burden of proof.<sup>10</sup>

Dr. LoGuidice, a resident physician, provided a history of injury on May 13, 2014 and obtained imaging studies showing a complete right biceps tendon tear. However, he did not mention the accepted November 28, 2006 occupational lifting incident or otherwise address causal relationship. Dr. LoGuidice's opinion is therefore inadequate to establish causal relationship.<sup>11</sup>

OWCP advised appellant by October 31, 2014 letter of the necessity of providing a narrative report from his attending physician with medical rationale supporting causal relationship. As appellant did not provide such evidence, OWCP's February 26, 2015 decision denying the claim is proper under the law and facts of the case.

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) of FECA,<sup>12</sup> section 10.606(b)(3) of Title 20 of the Code of Federal 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 it; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>13</sup> Section 10.608(b) provides that when an

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<sup>10</sup> *Supra* note 9.

<sup>11</sup> Appellant submitted a December 1, 2006 emergency room report bearing an illegible signature. As the report does not contain an identifiable signature, it does not constitute medical evidence. *Merton J. Sills*, 39 ECAB 572 (1988).

<sup>12</sup> 5 U.S.C. § 8128(a).

<sup>13</sup> 20 C.F.R. § 10.606(b)(3).

application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>14</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>15</sup> Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>16</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>17</sup>

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

Appellant claimed that he sustained a right shoulder injury in the performance of duty on November 28, 2006 when he lifted a bucket of water. OWCP denied the claim in a February 26, 2015 decision, finding that causal relationship was not established.

In an April 4, 2015 appeal request form, received on April 15, 2015, appellant requested reconsideration. He did not submit evidence or argument. OWCP denied reconsideration by May 7, 2015 decision, finding that appellant did not submit new, relevant evidence, or argument in support of his request. The Board will therefore analyze whether this determination was correct regarding each argument and document provided.

The only evidence appellant submitted on reconsideration was the April 4, 2015 appeal request form. He did not submit any additional evidence or argument. Therefore, appellant provided nothing of relevance for OWCP to consider. The appeal form does not comprise a basis for reviewing the merits of the case.<sup>18</sup>

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence or argument. Appellant did not do so in this case. He also did not show that OWCP erroneously applied or interpreted a point of law. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant has not established a right upper extremity injury in the performance of duty. The Board further finds that OWCP properly denied reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>14</sup> *Id.* at § 10.608(b). See also *D.E.*, 59 ECAB 438 (2008).

<sup>15</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>16</sup> See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>17</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>18</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 7 and February 26, 2015 are affirmed.

Issued: November 3, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board