

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

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**B.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Kenosha, WI, Employer**

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**Docket No. 17-1227  
Issued: December 19, 2017**

*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On May 15, 2017 appellant filed a timely appeal from a March 8, 2017 merit decision and an April 20, 2017 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 met her burden of proof to establish a worsening of neck, lumbar, and right upper extremity conditions causally related to factors of her federal employment; and (2) whether OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On December 13, 2016 appellant, then a 62-year-old sales associate, distribution clerk working modified duty, filed an occupational disease claim (Form CA-2) alleging that a recent change in employment duties caused worsening of neck, lumbar, right shoulder, right elbow, right wrist, and right hand conditions. The employing establishment indicated that appellant had stopped work on July 29, 2016, returned to partial duty on September 21, 2016, and that she had previous claims for the same conditions.<sup>2</sup> In a statement signed by appellant on July 12, 2016, she alleged that she was standing eight hours per day, and on July 9, 2016 was told to sort heavy parcels.

In support of her claim, appellant submitted a health history she signed on August 23, 2016 in which she indicated that repetitive motion from casing letters for 8 to 10 hours daily and lifting for 6 days a week caused right shoulder and right thumb pain. She reported a past history of right elbow and lumbar surgery.

Medical evidence submitted included a July 28, 2016 report in which Dr. Elizabeth Polacheck, a Board-certified physiatrist, advised that appellant should be off work effective July 29, 2016 due to right shoulder and right wrist pain. On an attending physician's report (Form CA-20) dated July 30, 2016, Dr. Polacheck noted a May 15, 1999 employment injury assigned OWCP File No. xxxxxx693. She diagnosed right shoulder pain with repetitive use and advised that the pain was due to the 1999 injury to the right arm. Dr. Polacheck indicated that appellant could not return to work.

An August 19, 2016 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated moderate-to-severe tendinosis of the distal supraspinatus and infraspinatus tendons, moderate hypertrophic osteoarthritic changes of the acromioclavicular joint, moderate tendinosis of the biceps tendon with partial thickness tearing of the subscapularis tendon, and mild glenohumeral joint osteoarthritis. An August 23, 2016 lumbar spine MRI scan showed worsening degenerative disc disease at L5-S1 and a stable L5 laminectomy defect.

In an August 23, 2016 treatment note, Dr. Joshua M. Gershtenson, a Board-certified orthopedic surgeon, noted his review of the right shoulder MRI scan. He reported a 15-year history of work-related right shoulder pain, and appellant's complaint of pain in the base of her thumb exacerbated by grasping and squeezing which she related to increased overhead work. Following physical examination, Dr. Gershtenson diagnosed right basilar thumb pain with degenerative joint disease, primary osteoarthritis, rotator cuff tendinopathy, and proximal biceps tendinopathy. He advised that appellant's work grasping heavier and awkward packages would cause an exacerbation of an underlying arthritic process.

On September 29, 2016 Dr. Diane W. Braza, Board-certified in physical and pain medicine, provided right arm restrictions that appellant could not lift more than five pounds,

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<sup>2</sup> The employing establishment also indicated that appellant's modified duties included selling merchandise in the lobby, answering questions, and helping with changes of address and vacation holds, and at 3:00 p.m. she would process carriers as they returned from the street, making sure postage dues and certified registers were taken care of before closing. Appellant's other claims are not before the Board on the present appeal.

could not work above chest height, and could not repetitively grip with the right hand. With regard to the left arm, she restricted appellant to eight pounds lifting, no repetitive gripping, and no repetitive movement of the left elbow. Appellant was to sit, stand, and walk as tolerated and was to limit bending and twisting of the lower back. In a November 7, 2016 attending physician's report, Dr. Braza also referenced the May 15, 1999 employment injury claim. She diagnosed lumbar radiculopathy status post laminectomy, herniated disc, and degenerative disc disease of the lumbar spine all due to the May 15, 1999 injury.

On October 4, 2016 Dr. Gershtenson noted that appellant had less pain with shoulder range of motion. He advised that appellant should work restricted duty and recommended a neurologist consultation. A nurse practitioner in Dr. Gershtenson's office provided a November 15, 2016 treatment note. In a November 16, 2016 attending physician's report, Dr. Gershtenson also noted the May 15, 1999 employment injury and claim. He diagnosed right shoulder rotator cuff tendinopathy and indicated by a check mark that it was employment related. Dr. Gershtenson noted that appellant could return to work with permanent restrictions provided by Drs. Braza and Polacheck.

Dr. Polacheck submitted an attending physician's report dated November 23, 2016. She again referenced the May 15, 1999 employment injury. She diagnosed right shoulder injury, elbow and wrist sprain, and indicated with a check mark that appellant's injury was employment related, opining that appellant's "1999 injury and resultant conditions caused exacerbation of right arm symptoms with repetitive use and limited sit down time." Dr. Polacheck advised that appellant could work restricted duty.

A nurse practitioner in the office of Dr. Jamie L. Baisden, a Board-certified neurosurgeon, provided an attending physician's report on December 2, 2016. She too referenced the May 15, 1999 employment injury and claim. Dr. Baisden diagnosed radicular pain due to the May 15, 1999 employment injury.

Additional evidence is of record and references OWCP File No. xxxxxx693. A statement with an illegible signature noted appellant's restrictions and indicate that she could lift 35 pounds continuously and 50 pounds occasionally and needed to occasionally sit. The report also indicated that appellant knew that she should not work outside her restrictions and that help was available to lift heavy packages. In a separate statement, the officer in charge indicated that all management personnel were aware of appellant's current restrictions and that she was never asked to work or perform any activity outside her restrictions. He also indicated that her request for a stool was approved.

Appellant also submitted claims for compensation (Form CA-7) for partial disability during the period November 12 to December 9, 2016.

By letter dated January 20, 2017, OWCP advised appellant that the documentation received was insufficient and advised her of the evidence needed to establish her claim. This was to include a comprehensive narrative report from her physician explaining how her work

activities caused or aggravated the claimed medical conditions. Appellant was afforded 30 days to respond.<sup>3</sup>

In response, appellant submitted January 31, 2017 correspondence in which Dr. Braza advised that appellant had been seen for worsening left leg pain which appellant attributed to throwing packages at work for four hours daily and working at a counter desk for four hours daily. Dr. Braza opined, to a reasonable degree of medical probability, upon reviewing appellant's history, physical examination, and lumbar MRI scan findings, a new left paracentral herniated disc at L5-S1 with left S1 nerve root compression due to an aggravation of a chronic work-related condition, noting that appellant was status post L5 laminectomy and L4-S1 foraminectomies. She concluded that appellant's job duties of prolonged standing, reaching, bending, and lifting contributed to the aggravation.

By decision dated March 8, 2017, OWCP denied appellant's claim, noting that the medical evidence submitted was insufficient to establish causal relationship.

On March 27, 2017 appellant requested reconsideration. In support of the request finding she submitted duplicates of Dr. Braza's January 31, 2017 report.

In a nonmerit decision dated April 20, 2017, OWCP denied the reconsideration request finding that appellant's request was insufficient to warrant a merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish 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 timely filed within the applicable time limitation period of FECA, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the asserted claim involves a traumatic injury or an occupational disease.<sup>5</sup>

OWCP regulations define the term "occupational disease or illness" as a condition produced by the work environment over a period longer than a single workday or shift.<sup>6</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

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<sup>3</sup> In a second January 20, 2017 letter, OWCP informed appellant that it would not adjudicate her CA-7 claims for compensation until the occupational disease had been adjudicated.

<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>6</sup> 20 C.F.R. § 10.5(ee).

occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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>

Causal relationship is a medical issue. The medical evidence required to establish causal relationship is rationalized medical evidence.<sup>8</sup> 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 employee.<sup>9</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

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

The Board finds that appellant has not met her burden of proof to establish an occupational disease of worsening neck, lumbar, and right upper extremity conditions as the medical evidence of record is insufficient to establish causal relationship.

At the time appellant filed her claim, on December 13, 2016, she was working in a modified clerk position which entailed selling merchandise in the lobby and helping customers with changes of address, vacation holds, and miscellaneous questions. She also processed carriers as they returned from their routes and ensured that postage dues and certified registers were taken care of before closing.<sup>11</sup>

The August 19, 2016 MRI scan of the right shoulder and the August 23, 2016 MRI scan of the lumbar spine did not provide a cause of any diagnosed conditions. 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.<sup>12</sup> Likewise, the November 7 and December 2, 2016

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<sup>7</sup> *Supra* note 5.

<sup>8</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>10</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>11</sup> *Supra* note 2.

<sup>12</sup> *Willie M. Miller*, 53 ECAB 697 (2002).

reports from nurse practitioners are not probative medical evidence as nurse practitioners are not considered physicians under FECA.<sup>13</sup>

The medical evidence most relevant to this claim includes reports from Dr. Polacheck, an attending physiatrist. Beginning on July 28, 2016 she advised that appellant should be off work due to right shoulder and right wrist pain. On July 30, 2016 Dr. Polacheck noted her right shoulder pain and advised that it was due to a 1999 right arm injury under OWCP File No. xxxxxx693.<sup>14</sup> In a report dated November 23, 2016, she diagnosed right shoulder, elbow and wrist injuries and also referenced the 1999 employment injury. While Dr. Polacheck indicated that the 1999 injury and resultant conditions caused exacerbation of appellant's right arm symptoms with repetitive use and limited sit down time, she did not express knowledge of appellant's specific modified job duties or sufficiently explain how or why those duties caused appellant's condition.<sup>15</sup> As such, her opinion is thus of diminished probative value and insufficient to meet appellant's burden of proof.

Likewise, the opinion Dr. Gershtenson, an attending orthopedic surgeon, is insufficient to meet appellant's burden. On August 23, 2016 he diagnosed right basilar thumb pain with degenerative joint disease, primary osteoarthritis, rotator cuff tendinopathy, and proximal biceps tendinopathy. Dr. Gershtenson advised that appellant's work duties of grasping heavier and awkward packages would have caused an exacerbation of an underlying arthritic process, but he too exhibited no knowledge of the modified job duties she actually performed. He therefore did not explain how specific work duties contributed to appellant's diagnosed conditions. Although appellant alleged that she had to sort heavy parcels, the record includes a description of her modified duties and restrictions, and indicates that she had help to lift heavy packages as needed. Dr. Gershtenson also referenced the May 15, 1999 employment injury. He advised that appellant could return to work with restrictions provided by Drs. Braza and Polacheck.

Dr. Braza, an attending pain management specialist, provided restrictions on September 29, 2016. On November 7, 2016 she diagnosed lumbar radiculopathy status post laminectomy, herniated disc, and degenerative disc disease of the lumbar spine, due to the May 15, 1999 injury. On January 31, 2017 Dr. Braza indicated that appellant was seen for an evaluation of worsening left leg pain which she attributed to throwing packages at work for four hours daily and working at a counter desk for four hours daily. Dr. Braza opined to a reasonable degree of medical probability, that upon reviewing appellant's history, physical examination, and lumbar MRI scan findings, a new herniated disc at L5-S1 with nerve root compression was due to an aggravation of a chronic work-related condition, noting that appellant was status post L5 laminectomy and L4-S1 foraminectomies. While she concluded that appellant's job duties of prolonged standing, reaching, bending, and lifting contributed to the aggravation, there is no

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<sup>13</sup> See *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Allen C. Handley*, 53 ECAB 551 (2002) (nurse practitioners are not considered physicians under FECA). Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

<sup>14</sup> The form report referenced a May 15, 1999 employment injury, adjudicated by OWCP under File No. xxxxxx693. The instant claim was adjudicated under File No. xxxxxx735.

<sup>15</sup> See *D.E.*, Docket No. 16-1604 (issued February 1, 2017).

indication in the record that appellant's modified position required that she perform these duties. Moreover, Dr. Braza also did not otherwise explain how or why particular duties contributed to diagnosed medical conditions.<sup>16</sup>

The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to a claimant's federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.<sup>17</sup> It is appellant's burden of proof to establish that the claimed conditions are causally related to factors of her federal employment. The Board finds that appellant submitted insufficient evidence to establish that the diagnosed conditions were caused or aggravated by employment factors. Without a detailed medical report describing how and why appellant's current condition was caused by employment factors, appellant did not meet her burden of proof.<sup>18</sup>

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**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>19</sup> Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).<sup>20</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>21</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>22</sup>

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<sup>16</sup> *Supra* note 15.

<sup>17</sup> *A.D.*, 58 ECAB 149 (2006).

<sup>18</sup> *Supra* note 15; *see also* *W.S.*, Docket No. 14-1022 (issued July 1, 2014).

<sup>19</sup> 5 U.S.C. § 8128(a).

<sup>20</sup> 20 C.F.R. § 10.608(a).

<sup>21</sup> *Id.* at § 10.606(b)(3).

<sup>22</sup> *Id.* at § 10.608(b).

## ANALYSIS -- ISSUE 2

On March 27, 2017 appellant submitted an appeal request form signifying by a check mark that she was requesting reconsideration with OWCP. In support of this request, she submitted duplicates of Dr. Braza's January 31, 2017 report.

The Board finds that, as appellant did not assert that OWCP erroneously applied or interpreted the law or advanced a relevant legal argument not previously considered by OWCP, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>23</sup>

With respect to the third above-noted requirement under section 10.606(b)(3), Dr. Braza's January 31, 2017 report was reviewed by OWCP in its March 8, 2017 decision. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>24</sup>

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied her reconsideration request.

## CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a worsening of neck, lumbar, and right upper extremity conditions causally related to factors of her federal employment. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>23</sup> *Id.* at § 10.606(b).

<sup>24</sup> *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 20 and March 8, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 19, 2017  
Washington, DC

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

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

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