



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts of the case as set forth in the prior Board decision are incorporated herein by reference.

Appellant, then a 56-year-old clerk, filed a traumatic injury claim (Form CA-1) on May 2, 2012 alleging a right shoulder injury while sorting letters into mail bins on November 11, 2011. She had previously been on disability for previous shoulder injury.<sup>4</sup> Appellant had returned to work on November 11, 2011.

In a November 14, 2011 report, Dr. Cornelius I. Nicoll, a specialist in orthopedic surgery and treating physician, noted that appellant was experiencing bilateral shoulder pain and was unable to elevate both arms above the shoulder. Appellant related that she went to work, developed severe pain, and ended up in the emergency room the same day. Dr. Nicoll opined that her problem was chronic and advised that she was totally disabled. He reported that the last time appellant worked was approximately eight years ago.

The employing establishment controverted the claim disputing appellant's characterization of her work that day. It further noted that she had failed to report her injury timely and, only filed this claim after a previously claimed injury regarding revolving doors that day had been denied under File No. xxxxxx293.

In a June 20, 2012 decision, OWCP accepted a November 11, 2011 incident, but denied the claim because appellant had failed to provide medical evidence sufficient to establish a right shoulder injury causally related to the work incident.

By letter dated June 28, 2012, appellant, through counsel, requested an oral hearing, which was held before an OWCP hearing representative on October 24, 2012.

In a September 12, 2012 report, Dr. Nicoll noted that appellant had "major problems" with her right shoulder. X-rays revealed post-traumatic arthritis and a possible right rotator cuff tear.

By decision dated January 11, 2013, an OWCP hearing representative affirmed the June 20, 2012 decision. He found that appellant had presented no medical evidence from a physician establishing a causal connection between the diagnosed condition and the November 11, 2011 work incident. Therefore, appellant failed to meet her burden of proof to establish a right shoulder injury causally related to the accepted incident.

In a November 21, 2013 report, Dr. Nicoll noted that appellant had injured her right shoulder on March 15, 2004, for which she had undergone surgery. He reported that she continued to experience chronic pain, stiffness, and limited right shoulder motion. Appellant also developed post-traumatic changes to her left shoulder as a result of compensating for the

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<sup>3</sup> Docket No. 14-1336 (issued October 9, 2014).

<sup>4</sup> OWCP File No. xxxxxx514.

right shoulder. Dr. Nicoll advised that appellant had been totally disabled until she attempted to return to work on November 11, 2011. He noted that he was on vacation and had not given her clearance to return to work. Dr. Nicoll opined that appellant developed severe pain in her right shoulder after performing her duties on this date, at which time she reinjured or aggravated the original condition.

On December 5, 2013 counsel filed a request for reconsideration.

In a decision dated February 3, 2014, OWCP denied modification of its prior decision. It found that Dr. Nicoll had provided no medical rationale to support his opinion that reaching to sort letters on November 11, 2011 caused appellant's right shoulder injury or aggravated her prior shoulder injury.

Counsel filed an appeal with the Board on May 30, 2014.

In an October 9, 2014 decision, the Board affirmed OWCP's February 3, 2014 decision. It found that appellant had failed to meet her burden of proof to establish an injury in the performance of duty on November 11, 2011.

In a January 8, 2015 report, Dr. Nicoll reiterated his previous opinion that appellant reinjured her March 15, 2004 right shoulder injury on November 11, 2011. He advised that, after undergoing surgery for a right labrum tear she was denied physical therapy. Dr. Nicoll believed that was the reason she never reached maximum improvement and developed post-traumatic right shoulder arthritis. He asserted that the repetitive motion activity on November 11, 2011, the first day she returned to work. Appellant caused the severe pain and stiffness in the right shoulder to the point where she was unable to elevate her arm.

On January 28, 2015 appellant, through counsel, requested reconsideration.

In a decision dated April 13, 2015, OWCP denied modification. It found that Dr. Nicoll's January 8, 2015 report failed to establish that the November 11, 2011 work incident was causally related to the claimed right shoulder injury.

Counsel filed an appeal with the Board on July 16, 2015, but on October 1, 2015 requested to withdraw the appeal to pursue a further reconsideration request.<sup>5</sup>

In a new report dated August 27, 2015, Dr. Nicoll reiterated that he believed appellant had sustained a new twisting right shoulder injury on November 11, 2011 because he had performed a right shoulder arthroscopy to repair a torn labrum 25 years ago. He reiterated that she subsequently developed post-traumatic arthritis in the right shoulder because her insurance company did not approve the recommended course of physical therapy. Dr. Nicoll noted that appellant underwent another surgery a few years later for decompression of the subacromial joint. This procedure provided some improvement to her right shoulder; however, the improvement was not complete.

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<sup>5</sup> *Order Dismissing Appeal*, Docket No. 15-1504 (issued December 18, 2015).

Dr. Nicoll advised that appellant had recently undergone a magnetic resonance imaging (MRI) scan which showed a new partial tear of the rotator cuff that was not present in the past. He related that he based his opinion on the results of this MRI and on his examination and treatment of appellant.

In an October 15, 2015 report, Dr. Nicoll asserted that on November 11, 2011 appellant sustained a twisting injury to her right shoulder at work which had remained painful since that date. He noted that she underwent an MRI scan in August 2015, which revealed a new tear of the right rotator cuff. Dr. Nicoll advised that, after comparing the recent MRI scan with the one from November 19, 2012, he believed that her right rotator cuff tear was the result of the November 11, 2011 work incident. He based this opinion on the history as related by appellant and on his treatment of appellant.

On January 20, 2016 counsel requested reconsideration.

In a decision dated April 15, 2016, OWCP denied modification. It found that appellant had failed to provide medical evidence sufficient to establish a right shoulder injury causally related to the accepted November 11, 2011 work incident.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> has the burden of proof to establish that 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.<sup>7</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>8</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.<sup>9</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>10</sup>

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(e)(e).

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>11</sup>

An award of compensation may not be based on surmise, conjecture, or speculation. Neither, the fact that appellant's condition 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>12</sup>

### ANALYSIS

It is uncontested that appellant experienced pain in her right shoulder while sorting mail on November 11, 2011. The question of whether an employment incident caused a personal injury can only be established by probative medical evidence.<sup>13</sup> The Board finds that appellant has not submitted such rationalized, probative medical evidence to establish that the November 11, 2011 employment incident caused a personal injury.

On appeal counsel contends that Dr. Nicoll's reports are uncontroverted and contain medical evidence sufficient to establish that she sustained a right shoulder injury because she was sorting mail on November 11, 2011.

Appellant submitted January 8, August 27, and October 15, 2015 reports from Dr. Nicoll. In his January 8, 2015 report, Dr. Nicoll reiterated that appellant aggravated her March 15, 2004 right shoulder injury on November 11, 2011. He advised that she reinjured her right shoulder with repetitive motion activity on November 11, 2011, the first day she returned to work. Dr. Nicoll also believed that the severe pain and stiffness in the right shoulder that appellant experienced that day was due to the activities of November 11, 2011. He advised in his August 27 and October 15, 2015 reports that appellant sustained a twisting injury to her right shoulder on November 11, 2011; she had experienced right shoulder pain since that time. He opined that, based on his treatment of appellant, the history she provided him, and a comparison of November 19, 2012 and August 2015 MRI scans, he believed her new right rotator cuff tear was the result of the November 11, 2011 work incident.

The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.<sup>14</sup> While Dr. Nicoll noted complaints of right shoulder pain which he generally attributed to the November 11, 2011 work incident and diagnosed a right rotator cuff tear, his reports did not provide a probative, rationalized opinion as to how the November 11, 2011 work incident caused a personal injury. The reports failed to sufficiently explain how appellant could have sustained a right shoulder rotator cuff tear due to

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<sup>11</sup> See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

<sup>12</sup> *Id.*

<sup>13</sup> *Carlone*, *supra* note 8.

<sup>14</sup> See *Anna C. Leanza*, 48 ECAB 115 (1996).

sorting mail on November 11, 2011. Dr. Nicoll did not adequately describe how appellant's duties that day could have been competent to cause the claimed condition. Appellant has failed to provide a report containing sufficient medical evidence demonstrating a causal connection between her November 11, 2011 work incident and her claimed right shoulder injury.<sup>15</sup>

Accordingly, the Board finds that appellant has not established a right shoulder injury in the performance of duty.

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.

### **CONCLUSION**

The Board finds that appellant has failed to meet her burden of proof to establish a right shoulder injury causally related to the accepted November 11, 2011 employment incident.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> See *S.H.*, Docket No. 16-1227 (issued February 9, 2017).