

and left leg due to continuous standing for six and one-half hours, walking back and forth to an all-purpose container (APC) machine and a counter, and providing relief on windows during the course of her federal employment. She alleged that she first became aware of her claimed condition and its relationship to her federal employment on May 24, 2017. In an accompanying narrative statement dated May 25, 2017, appellant reiterated that her work duties involved prolonged standing and walking and using an APC machine. She also related that she worked in a lobby where she assisted customers and accepted and processed Priority Mail and parcels. Appellant attributed severe pain in her lower back and left leg to performing window services in the lobby. However, prior to the filing of her Form CA-2 in the instant claim and prior to completion of the narrative statement, the employing establishment offered appellant a modified assignment as an MPOS/lunch relief clerk on February 10, 2017. Appellant accepted this position on that same date. The job offer was effective as of February 11, 2017, and noted a July 15, 2016 date of injury. The modified assignment required sitting up to eight hours a day in a lobby with an MPOS device, lunch relief at a front window, and lifting up to 15 pounds, zero to two hours a day.

On May 30, 2017 appellant completed a Kaiser Permanente initial industrial visit questionnaire. She indicated a date of injury as May 24, 2017. Appellant provided a history of injury as continuous standing, walking, and reaching over which aggravated pain in her lower back and left leg.

In a March 29, 2017 industrial work status report, Dr. Brian E. Knapp, a physician Board-certified in occupational medicine, noted July 15, 2016 as the date of injury. He also noted a diagnosis of osteoarthritis of the right acromioclavicular joint and right shoulder internal impingement. Dr. Knapp indicated that appellant's previsit work status was working modified duty and listed her permanent restrictions.

In a May 26, 2017 work status report, Dr. Eric J. Crisostomo, a Board-certified internist, placed appellant off work through May 30, 2017. He also placed her on modified activity at home and work from May 31 through July 2, 2017. Dr. Crisostomo advised that, if modified activity was not accommodated by the employing establishment, then appellant was considered temporarily totally disabled from her regular work for the designated time and a separate off work order was not required.

OWCP, by development letter dated June 14, 2017, informed appellant that the evidence of record was insufficient to support her claim. It provided a questionnaire for completion and advised her to provide a job offer or position description regarding the duties of her position and to describe in detail the employment-related activities which she believed contributed to her condition, how often she performed the activities described, for how long on each occasion, and all activities and hobbies outside of her federal employment. OWCP also requested that appellant submit medical evidence, including a detailed narrative report from her physician, which included a history of the injury and a medical explanation with objective evidence of how the reported work activities caused, contributed to, or aggravated the claimed condition. It afforded her 30 days to submit the requested information.

In support of her claim, appellant submitted a July 2, 2017 letter from Dr. Crisostomo. Dr. Crisostomo reported that she had symptoms of lower back pain with radiation down her left

leg and right shoulder pain. He further reported that the low back pain started sometime in 2014 and appellant felt that it was related to lifting packages and twisting to set them down. Dr. Crisostomo noted one instance in 2015 where she lifted a heavy box and strained her back. He related that appellant felt her right shoulder pain was due to repetitive lifting and reaching overhead. Dr. Crisostomo maintained that her symptoms certainly could be due to such activities especially if she had to consistently perform them (lifting, reaching). He provided a history of appellant's medical treatment for these symptoms from April 18, 2016 to June 9, 2017 by an occupational medicine physician and himself. Dr. Crisostomo related that she was diagnosed with spinal stenosis, spinal degenerative joint/disc disease, and right shoulder impingement syndrome. He indicated that a February 2015 lumbar spine magnetic resonance imaging scan showed L4-5 spinal stenosis and multilevel degenerative joint disease and degenerative disc disease. Dr. Crisostomo related that, so far, certain treatment measures had failed to provide lasting relief of appellant's symptoms. He listed her work restrictions.

By decision dated August 2, 2017, OWCP denied appellant's claim, finding that she had not established the factual portion of her claim as she provided an inconsistent history of injury. OWCP noted that she had already commenced work in her modified position on the date that she alleged her occupational disease arose. It also noted that she had failed to respond to its development letter and submit a copy of her modified job duties. OWCP also noted that her description of the job duties she alleged resulted in her injury were inconsistent with the job duties set forth in the medical report of Dr. Crisostomo. Finally, it found that appellant failed to submit sufficient medical evidence to establish that her diagnosed medical conditions were causally related to the work injury or event.

On September 5, 2017 appellant requested reconsideration. She noted that she was submitting new documentation from her physician, which indicated that her job duties caused her condition. Appellant also noted that she was submitting documentation from Dr. Knapp, which documented her lumbosacral joint sprain (back). OWCP, however, did not receive any new medical evidence.

By decision dated September 27, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that her request for reconsideration neither raised substantive legal questions, nor included relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

² *Supra* note 1.

employment injury.³ 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.⁴

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 occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish back and left leg injuries in the performance of duty, as alleged.

Appellant alleged that she developed back and left leg pain as a result of continuously standing for six and one-half hours, walking to an APC machine and a counter, and assisting customers and accepting and processing Priority Mail and parcels at a lobby window. She contended that she first became aware of her condition and its relationship to her federal employment on May 24, 2017. OWCP denied appellant's claim, finding that she failed to establish fact of injury.

The Board finds that there are inconsistencies in the record with regard to how the alleged injuries occurred. In the June 7, 2017 Form CA-2 and accompanying May 25, 2017 narrative statement, appellant alleged that her distribution/sales associate duties, which involved continuous standing for six and one-half hours, walking to an APC machine and a counter, and assisting customers and accepting and processing Priority Mail and parcels at a lobby window, caused her back and left leg injuries. However, the employing establishment's February 10, 2017 job offer indicates that prior to the filing of her occupational disease claim in the instant case, appellant had accepted a modified MPOS/lunch relief clerk position, effective February 11, 2017. The position required sitting up to eight hours a day in a lobby with an MPOS device, lunch relief at a front window, and lifting up to 15 pounds zero to two hours a day. The job position and work duties are different than the position and work duties appellant alleged caused her claimed injuries.

³ C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.*

Further, Dr. Knapp's March 29, 2017 industrial work status report implicates that appellant was performing modified-duty work prior to the filing of her occupational disease claim. He noted that appellant's work status prior to her visit with him was modified duty. Appellant did not respond to a questionnaire and failed to provide a job offer or position description regarding the job duties which she believed contributed to her claimed back and left leg conditions as requested by OWCP in its June 14, 2017 development letter.

There are also inconsistencies regarding the date of injury and appellant's actual injuries. The employing establishment's February 10, 2017 job offer and Dr. Knapp's March 29, 2017 industrial work status report listed July 15, 2016 as the date of injury, a different date of injury than that provided by appellant. In addition, Dr. Knapp provided right shoulder diagnoses which are not consistent with the back and left leg conditions appellant alleged that she developed as a result of her work duties. Moreover, while Dr. Crisostomo's July 2, 2017 letter found that appellant's back and right shoulder conditions could be due to lifting heavy packages and twisting, this history of injury contradicts appellant's claim of sustaining back and left leg injuries due to continuous standing for six and one-half hours, walking to an APC machine and a counter, and assisting customers and accepting and processing Priority Mail and parcels at a lobby window. As noted, appellant did not respond to OWCP's questionnaire and failed to submit a job offer or position description concerning the job duties which she believed contributed to her claimed back and left leg conditions.

For the reasons set forth above, the Board finds that appellant has not sufficiently established the employment activities alleged to have caused or contributed to her claimed conditions to meet her burden of proof.⁶ As appellant has not established the factual component of her claim, the Board will not address the medical evidence with respect to causal relationship.⁷

On appeal appellant describes her work duties that she believes caused her claimed back and left leg injuries. She relates that a supervisor instructed her to walk customers over to an APC machine and then she walked back to her station. Appellant relates that she was also instructed to sell stamps and mail customers' packages with a mobile POS machine which could not be done while sitting down. She maintains that she stood and walked back and forth up to six hours each day. However, for the reasons discussed above, appellant failed to establish fact of injury.

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 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application

⁶ *W.C.*, Docket No. 15-1123 (issued November 13, 2015).

⁷ *See T.C.*, Docket No. 17-1449 (issued November 17, 2017); *B.G.*, Docket No. 16-1454 (issued November 22, 2016).

by a claimant.⁸ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁹ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 2

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

Appellant disagreed with OWCP's denial of her occupational disease claim for back and left leg injuries causally related to alleged factors of her federal employment. On September 5, 2017 she requested reconsideration. Appellant did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by OWCP. Thus, she is 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).

In her September 5, 2017 request for reconsideration, appellant indicated that new evidence would be submitted. However, the record does not reflect that any new evidence was received by OWCP. Appellant did not submit any relevant and pertinent new evidence in support of her request for reconsideration.¹²

The Board finds that 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 provide relevant and pertinent new evidence not previously considered by OWCP. Appellant therefore did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.608(a).

¹⁰ *Id.* at § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b).

¹² *See Patricia G. Aiken*, 57 ECAB 441 (2006); *A.C.*, Docket No. 12-1866 (issued January 23, 2013).

¹³ *See A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish back and left leg injuries in the performance of duty, as alleged. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 27 and August 2, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 3, 2018
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