



injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On December 18, 2017 appellant, then a 56-year-old postmaster, filed an occupational disease claim (Form CA-2) alleging that an accepted left shoulder condition had caused overuse of his right upper extremity, resulting in bursitis and a partial thickness rotator cuff tear of the right shoulder on or before November 1, 2017. He explained that his left shoulder condition had required five surgeries since 2003. In an associated December 18, 2017 statement, appellant described decreased range of right shoulder motion commencing in May 2017, which worsened in October 2017. He asserted that in November 2017, an attending physician, opined that the right shoulder condition was due to overcompensation for the weakened left shoulder.

An employing establishment supervisor controverted the claim, contending that appellant sustained multiple falls while roller skating.<sup>3</sup>

A December 12, 2017 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated lateral supraspinatus tendinosis, infraspinatus tendinosis, subscapularis tendinosis, an possible horizontal tear of the superior labral foramen, marrow edema in the greater tuberosity just below the insertion of the supraspinatus tendon, and mild subdeltoid and subacromial bursitis. This diagnostic report was not signed by a physician.

By development letter dated January 3, 2018, OWCP notified appellant that additional medical and factual evidence was necessary to establish his claim. Appellant was also provided a list of questions for his physician regarding how the identified work factors would have caused the claimed right shoulder condition. OWCP advised that a detailed, well-rationalized opinion from a physician regarding causal relationship was crucial to his claim. It afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted a June 26, 2018 narrative statement. He asserted that, following six surgeries on his left shoulder, he had been limited to performing only keyboarding tasks at work with his left upper extremity. Appellant attributed his right shoulder condition to overcompensating for his weakened left arm. He noted that, from 2004 to 2016, he performed repetitive tasks such as moving trays and tubs of mail, custodial duties, and moving mail processing equipment weighing up to 2,000 pounds. While reaching forward to staple papers together on an unspecified date, appellant felt a sudden pain in his right deltoid, with a burning sensation in his right shoulder when extending his right arm. He described hobbies of gardening and motorcycle maintenance for two hours a week, and roller skating for two hours every two weeks. Appellant contended that he had no prior right upper extremity injuries.

---

<sup>3</sup> In a December 21, 2017 statement, the employing establishment controverted the claim. Appellant had been off from work in 2016 due to left shoulder surgery. Commencing on December 28, 2016 he had been detailed to a position as an Electronic Customer Complaint Supervisor, answering the telephone, performing computer data entry, and visually checking mail. Appellant's manager submitted a December 21, 2017 e-mail in which she alleged that appellant had told her that he went "roller skating every Thursday evening" and described "some bad falls [appellant] has taken while roller skating and how sore he was for several days afterwards."

Appellant provided a February 12, 2018 note from Shannon Krisa, a physician assistant, who reported that, for medical reasons, he was unable to work.

By decision dated February 28, 2018, OWCP accepted that the identified work factors occurred as alleged, but denied the claim as the medical evidence of record did not contain a diagnosis of a right shoulder injury or condition causally related to the accepted factors of employment.

On March 12, 2018 appellant requested reconsideration. No additional evidence was received.

By decision dated April 3, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a), finding that he did not submit new and relevant evidence, or legal argument sufficient to warrant reopening the merits of his claim.

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

The claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.<sup>4</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>5</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>6</sup>

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, The Law of Workers' Compensation notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original

---

<sup>4</sup> *Charles W. Downey*, 54 ECAB 421 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>5</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>6</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>7</sup>

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

The Board finds that appellant has not met his burden of proof to establish a consequential right shoulder condition causally related to the accepted left shoulder employment injury.

Appellant alleged that he developed a right shoulder condition due to repetitive upper extremity motion at work and overcompensating for a previously injured left shoulder. OWCP accepted that these employment factors occurred as alleged. However, appellant submitted insufficient medical evidence to establish a diagnosed right shoulder condition caused or aggravated by the accepted factors of his federal employment.

Appellant submitted a December 2017 MRI scan report which demonstrated tendinosis of the supraspinatus, infraspinatus, and subscapularis tendons, a possible tear of the superior labral foramen, and mild subdeltoid and subacromial bursitis. The Board has previously explained that diagnostic test reports lack probative value as they fail to provide an opinion on the causal relationship between his employment duties and the diagnosed conditions.<sup>8</sup>

Appellant also provided a February 12, 2018 note from Ms. Krisa, a physician assistant. This opinion is not competent medical evidence as physician assistants are not considered physicians under FECA.<sup>9</sup>

As explained above, to establish a consequential condition, appellant must submit medical evidence containing not only a diagnosis of a medical condition, but also a physician's rationalized opinion explaining how the diagnosed condition is causally related to appellant's accepted employment factors.<sup>10</sup> The Board finds that as there is no reasoned medical evidence of record explaining how the accepted employment injury caused or aggravated his medical condition involving his right shoulder, he has not met his burden of proof to establish a consequential injury.<sup>11</sup>

On appeal, appellant contends that he submitted a February 15, 2018 medical report from his attending physician, but that OWCP failed to consider it. The Board notes that there is no

---

<sup>7</sup> *K.S.*, Docket No. 17-1583 (issued May 10, 2018); Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014).

<sup>8</sup> *See E.P.*, Docket No. 18-0194 (issued September 14, 2018).

<sup>9</sup> *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

<sup>10</sup> *See E.B.*, Docket No. 09-1055 (issued December 14, 2009).

<sup>11</sup> *Supra* note 6.

evidence of record that OWCP received such a report prior to issuance of the April 3, 2018 nonmerit decision.

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 to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>12</sup>

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>13</sup> OWCP's regulations provide that the evidence or argument submitted by 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>14</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>15</sup> When a request for reconsideration is timely and the claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>16</sup>

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

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim.

The Board finds that as appellant did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP, he is not entitled to a review of the merits of his claim based on the first and second requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. The underlying issue in this case is whether appellant submitted sufficient medical evidence establishing a consequential right shoulder condition causally related to the accepted employment injury. He did not submit any medical evidence in support of his request for reconsideration. The Board accordingly finds that appellant has not met any of the

---

<sup>12</sup> 5 U.S.C. § 8128(a).

<sup>13</sup> *Id.* Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>14</sup> 20 C.F.R. § 10.606(b)(3).

<sup>15</sup> *Id.* at § 10.607(a).

<sup>16</sup> *Id.* at § 10.608(b).

requirements of 20 C.F.R. § 10.606(b)(3) in his March 12, 2018 request for reconsideration. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a consequential right shoulder condition causally related to his accepted left shoulder employment injury. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 3 and February 28, 2018 are affirmed.

Issued: December 11, 2018  
Washington, DC

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

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

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