



## **ISSUES**

The issues are: (1) whether appellant has established an injury to his left shoulder and neck causally related to a July 26, 2016 employment incident; and (2) whether OWCP properly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On August 8, 2016 appellant, then a 56-year-old packer, filed a traumatic injury claim (Form CA-1) alleging that, on July 26, 2016, he injured his left shoulder and the left side of his neck lifting an unexpectedly heavy parcel. The employing establishment did not controvert the claim, but noted that he might have experienced an aggravation of a prior work injury, assigned File No. xxxxxx956.

In an August 1, 2016 statement accompanying his claim, appellant related that a coworker asked him for help to move a parcel. He did not know what was in the parcel and it was much heavier than he had expected. Appellant felt a twinge in his left shoulder at the time that he believed was a pulled muscle. His neck was stiff and he had left shoulder pain.

Dr. Kevin J. Poole, Board-certified in family medicine, evaluated appellant on August 4, 2016 for cervical pain with radiculopathy, neck pain, and a left shoulder injury. He referred him for diagnostic studies and, in an accompanying disability slip, found that he could work with restrictions.

A computerized tomography (CT) scan of the left shoulder, obtained on August 10, 2016, revealed fraying of the undersurface of the anterior supraspinatus without a discrete tear and mild acromioclavicular (AC) joint degeneration. An August 10, 2016 CT scan of the cervical spine revealed an anterior cervical discectomy and fusion at C5-6 with straightening of the cervical lordosis, a mature fusion at C6-7, an incomplete fusion at C5-6, and bilateral hypertrophy at C5-6 and C6-7 with some neural foraminal stenosis.

Dr. Poole, in a report dated August 16, 2016, reviewed the results of objective studies and diagnosed a “[w]ork injury with neural foraminal stenosis of the cervical spine and supraspinatus tendinitis and AC joint arthritis.” He opined that appellant should be evaluated by an orthopedist.

On August 23, 2016 Dr. Matthew J. Espenshade, an osteopath, discussed appellant’s history of an injury at work on July 26, 2016 when he helped a coworker pick up material. He subsequently experienced pain in the front and back of his left shoulder, but no cervical pain. Dr. Espenshade diagnosed a left shoulder rotator cuff strain and left shoulder bursitis and referred appellant for therapy.

Appellant underwent physical therapy in August and September 2016.

In a September 19, 2016 progress report, Dr. Espenshade noted that appellant’s condition had improved with physical therapy. He diagnosed left shoulder bursitis and a rotator cuff strain and opined that he could resume his “permanent light-duty restrictions.”

OWCP, by letter dated November 2, 2016, advised appellant that it had paid a limited amount of medical expenses as his claim initially appeared minor and was uncontroverted. It was now formally adjudicating his claim. OWCP requested that appellant submit medical evidence from his attending physician explaining the causal relationship between a diagnosed condition and the identified work incident.

By decision dated December 5, 2016, OWCP denied appellant's traumatic injury claim. It found that he had failed to submit sufficient medical evidence to establish that he sustained a diagnosed condition causally related to the July 26, 2016 employment incident.

In a December 28, 2016 addendum to his September 19, 2016 report, Dr. Espenshade related that he began treating appellant for his left shoulder condition on August 23, 2016 and that it was his "professional opinion that his left shoulder strain was directly related to his work injury that occurred on July 26, 2016."

Appellant, on January 10, 2017, requested reconsideration.

By decision dated April 10, 2017, OWCP denied appellant's request for reconsideration as he had not submitted evidence or raised an argument sufficient to warrant reopening his case for further merit review under section 8128(a). It found that he had not submitted any new evidence. OWCP noted that in his September 19, 2016 report, Dr. Espenshade did not provide rationale explaining how the lifting incident caused the diagnosed condition.

On appeal appellant, through his representative, contends that he submitted the medical evidence requested and that it is sufficient to establish that he sustained a work injury.

### **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 filed within the applicable time limitation,<sup>5</sup> that he or she sustained an injury in the performance of duty as alleged, and that disability from work, if any, was causally related to the employment injury.<sup>6</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.<sup>7</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> *See R.C.*, 59 ECAB 427 (2008).

<sup>6</sup> *Id.*; *Elaine Pendleton*, 40 ECAB 1142 (1989).

<sup>7</sup> *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

establish causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>8</sup>

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>10</sup> must be one of reasonable medical certainty<sup>11</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>12</sup>

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

Appellant alleged that he sustained an injury to his left shoulder and neck on July 26, 2016 when he lifted a heavy parcel. He has established that the July 26, 2016 incident occurred at the time, place, and in the manner alleged. The issue, consequently, is whether the medical evidence of record establishes an injury as a result of this incident.

The Board finds that appellant has not established that the July 26, 2016 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.<sup>13</sup>

In a report dated August 4, 2016, Dr. Poole discussed appellant's complaints of cervical radicular pain, neck pain, and an injury to the left shoulder. He found that he could perform modified employment and recommended diagnostic testing. Dr. Poole did not address causation. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.<sup>14</sup>

On August 16, 2016 Dr. Poole found that CT scans of the left shoulder and cervical spine revealed cervical neural foraminal stenosis, AC joint arthritis, and supraspinatus tendinitis. He noted that appellant had sustained a work injury. Dr. Poole, however, did not provide a history of the July 26, 2016 employment incident or explain how it resulted in the diagnosed conditions. A physician must provide a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to a diagnosed medical condition.<sup>15</sup> Consequently, Dr. Poole's report is of diminished probative value.

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<sup>8</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>9</sup> *John J. Montoya*, 54 ECAB 306 (2003).

<sup>10</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, *supra* note 8.

<sup>11</sup> *Supra* note 9.

<sup>12</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

<sup>13</sup> *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>14</sup> *See T.M.*, Docket No. 16-1456 (issued January 10, 2017); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

<sup>15</sup> *See supra* note 9.

Dr. Espenshade, in an August 23, 2016 report, obtained a history of appellant experiencing left shoulder pain after helping a coworker lift material on July 26, 2016. He diagnosed a strain of the left rotator cuff and left shoulder bursitis. In a progress report dated September 19, 2016, Dr. Espenshade noted that appellant's condition had improved with physical therapy and diagnosed left shoulder bursitis and a strain of the left rotator cuff. He did not, however, specifically attribute the diagnosed conditions to the July 26, 2016 work incident. As he did not address causation, Dr. Espenshade's report is of little probative value on the issue of causal relationship.<sup>16</sup>

Appellant submitted physical therapy reports dated August and September 2016. Physical therapists, however, are not considered physicians as defined under FECA and their reports have no probative value. Thus these reports are insufficient to establish his claim.<sup>17</sup>

On appeal appellant asserts that he submitted sufficient medical evidence to establish his claim. As discussed, however, he has the burden to furnish reasoned medical evidence supporting that the July 26, 2016 work incident caused or aggravated a diagnosed condition.<sup>18</sup> The medical evidence of record is currently insufficient to meet appellant's burden of proof.<sup>19</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>20</sup> OWCP's 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 OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>21</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, OWCP must receive the request for reconsideration within one year of the date of OWCP's decision for which review is sought.<sup>22</sup> When a 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>23</sup>

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<sup>16</sup> See *A.W.*, Docket No. 17-0638 (issued August 29, 2017); *A.D.*, 58 ECAB 149 (2006).

<sup>17</sup> 5 U.S.C. § 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See *E.W.*, Docket No. 16-1729 (issued May 12, 2017).

<sup>18</sup> See *S.C.*, Docket No. 17-0490 (issued June 27, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application."

<sup>21</sup> 20 C.F.R. § 10.606(b)(3).

<sup>22</sup> *Id.* at § 10.607(a).

<sup>23</sup> *Id.* at § 10.608(b).

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>24</sup>

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

In its December 5, 2016 merit decision, OWCP found that appellant had not submitted sufficient medical evidence to establish a medical condition causally related to the July 26, 2016 employment incident. With his request for reconsideration, appellant submitted a December 28, 2016 addendum from Dr. Espenshade included as part of his September 19, 2016 medical report. Dr. Espenshade noted that he had treated appellant since August 23, 2016 for a left shoulder condition. He opined that appellant sustained left shoulder strain directly related to the accepted July 26, 2016 employment incident. In its April 10, 2017 decision, OWCP found that he had not submitted new evidence, noting that Dr. Espenshade addressed causation in his September 19, 2016 report without supporting medical rationale. OWCP, however, did not previously consider Dr. Espenshade's December 28, 2016 addendum to the September 19, 2016 report addressing causal relationship. As his finding regarding causal relationship pertained directly to the relevant issue of whether appellant sustained an injury due to the July 26, 2016 work incident and was not previously of record, it is sufficient to warrant reopening the case for further merit review.<sup>25</sup>

As discussed, to require merit review it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>26</sup> If OWCP determines that the new evidence lacks probative value, it may deny modification of its prior decision, but only after the case has been reviewed on the merits.<sup>27</sup> As Dr. Espenshade's December 28, 2016 addendum constituted pertinent new and relevant medical evidence, the Board finds that OWCP improperly denied appellant's request for review of the merits of the claim.<sup>28</sup> The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision on the claim.

### **CONCLUSION**

The Board finds that appellant has not established an injury to his left shoulder and neck causally related to the accepted July 26, 2016 work incident. The Board further finds that OWCP improperly denied his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

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<sup>24</sup> See *C.L.*, Docket No. 14-1904 (issued May 18, 2015).

<sup>25</sup> See *J.H.*, Docket No. 14-1777 (issued December 1, 2015).

<sup>26</sup> See *D.M.*, Docket No. 17-0038 (issued June 8, 2017).

<sup>27</sup> See *D.W.*, Docket No. 15-1225 (issued February 22, 2016); *C.M.*, Docket No. 14-1887 (issued May 6, 2015).

<sup>28</sup> See *J.A.*, Docket No. 14-1939 (issued January 9, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 10, 2017 decision of the Office of Workers' Compensation Programs is set aside and the December 5, 2016 decision is affirmed. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 11, 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