

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

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| M.S., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1001 |
| |) | Issued: December 9, 2019 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Urbana, OH, Employer |) | |
| |) | |

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 8, 2019 appellant filed a timely appeal from an October 18, 2018 merit decision and a February 27, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment; and

¹ 5 U.S.C. § 8101, *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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

FACTUAL HISTORY

On May 4, 2018 appellant, then a 59-year-old retired distribution window clerk, filed an occupational disease claim (Form CA-2) alleging a right shoulder condition, due to factors of her prior federal employment including reaching over counters and lifting heavy objects. She identified November 12, 1996 as the date she first became aware of her condition and May 1, 2016 as the date she first realized that the condition was caused or aggravated by her federal employment. On the reverse side of the Form CA-2, the employing establishment noted that appellant stopped work on September 29, 2016 and retired the next day. OWCP assigned the claim OWCP File No. xxxxxx031 and that claim has been administratively combined with prior upper extremity claims with OWCP File No. xxxxxx206 designated as the master file.³

In a signed statement received on May 9, 2018, appellant stated that she recently discovered that she had torn her rotator cuff again and would need additional surgery.

In a development letter dated May 16, 2018, OWCP notified appellant of the type of additional evidence needed to establish her occupational disease claim, including factual evidence documenting hazardous exposures at work, and a statement from her physician explaining the causal relationship between the exposures and the claimed conditions. It also provided an attached questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a May 27, 2018 statement, appellant explained that she had not recovered from her previous surgery, despite undergoing therapy and returning to work. She stated that she continued to have difficulty using her arm and that she attempted various courses of treatment, of which physical therapy was most effective. Appellant noted that, after her coworker S.T. retired, she was assigned more repetitive tasks and longer hours, and after an additional two of her coworkers retired, she remained the only one in her position. She also indicated that her office was busier with an increased amount of parcels, some of which weighed up to 50 pounds. With the increased hours and workload, appellant continued to work until she felt that her shoulder was unable to bear it, at which point she retired.

By decision dated June 21, 2018, OWCP accepted that appellant filed a timely claim and that the employment factors occurred as alleged. However, it denied the claim based on the medical component of fact of injury finding that no medical evidence had been submitted subsequent to the filing of the occupational disease claim on May 9, 2018.

³ Under OWCP File No. xxxxxx206, appellant has a previously accepted occupational disease claim for right carpal tunnel syndrome with carpal tunnel release, right shoulder rotator cuff tear, and aggravation of right distal clavicle arthropathy, which arose on or about November 12, 1996. With respect to her right shoulder, she underwent surgery on November 16, 1999, May 13, 2003, and August 4, 2004. Appellant also has an accepted occupational disease claim for bilateral epicondylitis under OWCP File No. xxxxxx187, which condition similarly arose on or about November 12, 1996.

On July 3, 2018 appellant submitted physical therapy notes reflecting treatment between March 14 and December 29, 2017.

In a report dated July 23, 2018, Dr. Joseph Mileti, a Board-certified orthopedic surgeon, reported that appellant had three previous surgeries for her right shoulder, and that even after the most recent surgery she continued to have difficulties and pain.⁴ He noted that she denied an injury in the last couple years and that since she started working it had been a progressive, slow, steady progression of pain in that right shoulder. Dr. Mileti opined that appellant's condition was a continuation of her preexisting problems, which had not fully resolved. He indicated a magnetic resonance imaging (MRI) scan revealed that she had return her right rotator cuff. Dr. Mileti diagnosed chronic right shoulder pain and a complete right rotator cuff tear.

On July 31, 2018 appellant requested reconsideration based on Dr. Mileti's report.

By decision dated October 18, 2018, OWCP granted reconsideration and modified the prior decision. It found that, although the medical evidence contained a valid diagnosis, Dr. Mileti had not provided an opinion as to whether the current rotator cuff tear was causally related to the accepted factors of appellant's federal employment. Therefore, OWCP denied the claim finding that causal relationship had not been established.

On January 3, 2019 appellant requested reconsideration. With her reconsideration request, she submitted a signed statement of even date. In the statement, appellant explained that Dr. Mileti had indicated that she had never returned to full capacity following the last surgery. She added that, between the increased work hours and the driving she performed to and from work, she experienced extra stress in her shoulders. Appellant indicated that her therapist had told her that the he suspected that her rotator cuff had been torn from performing physical therapy over an extended period of time.

By decision dated February 27, 2019, OWCP denied reconsideration finding that the evidence submitted on reconsideration was irrelevant and did not raise substantive legal arguments not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ 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 of FECA,⁶ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to

⁴ Dr. Mileti performed May 13, 2003 and August 4, 2004 right shoulder surgical procedures.

⁵ *Supra* note 1.

⁶ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.⁷ 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.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of a disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹¹ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹²

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition is causally related to the accepted factors of her federal employment.

In a July 23, 2018 medical report, Dr. Mileti indicated that appellant had undergone three previous surgeries for her right shoulder, and that even after the most recent surgery she had continued to have difficulties and pain, but that she denied a recent injury. Instead, he noted that she had a slow and steady progression of pain in her right shoulder. Dr. Mileti opined that appellant's condition was a continuation of her preexisting problems which had not fully resolved, and he indicated that a right shoulder MRI scan revealed that she had return her right rotator cuff,

⁷ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹⁰ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, *supra* note 9.

¹² *Id.*

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

though he did not indicate when this tear might have occurred. This statement provides support for a worsening of appellant's condition since the most recent surgery in 2004. However, Dr. Mileti's report is insufficient to meet her burden of proof to establish a new injury as he failed to provide a complete history of injury, nor did he explain how and why her right shoulder rotator cuff tear was causally related to the accepted factors of her employment.¹⁴ The Board has consistently held that complete medical rationalization is particularly necessary when there are preexisting conditions involving the same body part, and has required medical rationale differentiating between the effects of the work-related injury and the preexisting condition in such cases.¹⁵ Without a detailed history discussing appellant's initial right shoulder employment injury as well how the implicated employment factors caused, aggravated, or precipitated her diagnosed condition, this report is insufficient to establish causal relationship.¹⁶

The remaining medical evidence of record is also insufficient to establish the claim. Although OWCP received treatment records authored by a physical therapist, a physical therapist is not considered a "physician" as defined under FECA, and so his or her reports are insufficient to establish entitlement to FECA benefits.¹⁷

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 compensation at any time on his or her own motion or on application.¹⁸

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

¹⁴ *D.E.*, Docket No. 16-1604 (issued February 1, 2017).

¹⁵ *Supra* note 13; *R.R.*, Docket No. 19-0048 (issued April 25, 2019).

¹⁶ *Id.*; *B.S.*, Docket No. 13-0920 (issued July 9, 2013).

¹⁷ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See* 5 U.S.C. § 8102(2); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

¹⁸ *Id.* at § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²¹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²²

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).

While appellant timely requested reconsideration, she neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered. Accordingly, the Board finds that she is not entitled to merit review based the first or second requirements under 20 C.F.R. § 10.606(b)(3).

OWCP previously denied appellant's claim because the medical evidence failed to establish causal relationship between her right shoulder condition and the accepted factors of her employment. Since issuing the October 18, 2018 merit decision, it has not received any medical evidence regarding her right shoulder condition. Although appellant submitted a signed statement containing her own opinion as to causal relationship, only medical evidence from a qualified physician is sufficient to establish the claim. Her own factual interpretation of the medical evidence or her belief as to causation does not constitute relevant medical evidence, as lay persons are not competent to render medical opinion.²³ Therefore, the Board finds that appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).²⁴

As appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) in her request for reconsideration, pursuant to 20 C.F.R. § 10.608, OWCP properly found that she was not entitled to further merit review of her occupational disease claim.

¹⁹ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²⁰ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. *Supra* note 13 at Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

²¹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²³ *See B.R.*, Docket No. 17-1661 (issued January 4, 2018); *James A. Long*, 40 ECAB 538 (1989).

²⁴ *B.P.*, Docket No. 19-0756 (issued August 15, 2019).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2019 and October 18, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 9, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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